

**SECTION 504
OF THE
REHABILITATION ACT OF 1973
AND
VERMONT SCHOOLS**

**A Manual for
Parents, Families and Schools**

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INTRODUCTION

Section 504 of the Rehabilitation Act of 1973¹ (Section 504) is a **federal law prohibiting discrimination on the basis of disability**. It applies to any entity that receives federal funding. Section 504 is similar to federal laws prohibiting discrimination in federally funded programs on the basis of race, national origin and gender. **Public school districts and independent schools that directly or indirectly receive federal funds** must comply with Section 504 both as providers of education to children and as employers.

Recipients of federal funds are individually responsible for compliance with Section 504. There are few state regulations governing compliance with Section 504.² If an individual feels that he or she has been subjected to unlawful discrimination by a Vermont school district or independent school, he or she may ask the U.S. Department of Education's Office for Civil Rights (OCR) to investigate and enforce compliance with the law.

The **Americans with Disabilities Act**, enacted in 1991, imposes the same obligations on public elementary and secondary schools as Section 504, but without the limitation of applying only to recipients of federal funds.³ Title II of the ADA applies to public entities, whether they receive federal funds or not. The ADA definition of "public entity" includes state and local governments as well as any other "instrumentality" of a state or local government.⁴ Title III of the ADA applies to independent schools that do not have religious affiliations and other "public accommodations."

The other major federal law affecting the education of students with disabilities is the **Individuals with Disabilities Education Act (IDEA)**.⁵ Unlike Section 504, which is a civil rights act, the IDEA is a funding statute. Its purpose is to provide financial aid to states in their efforts to ensure adequate and appropriate educational services to children with disabilities. Theoretically, a state could reject IDEA funds and thereby avoid the responsibilities it imposes. A state or local entity cannot avoid Section 504 responsibilities, however, unless it refuses all federal funds, and then it would remain responsible for substantial compliance with Section 504 standards through the ADA. Because the IDEA makes states responsible for ensuring that its

¹ 29 U.S.C. § 794.

² For exceptions, *see*, Vermont State Board of Education Manual of Rules and Practices, Rule 1253 (on hearing processes for Section 504 disputes) and Rule 4312 (on disciplining students who are or may be eligible under Section 504).

³ 42 U.S.C. § 12101 et seq.

⁴ 42 U.S.C. § 12131(1).

⁵ 20 U.S.C. § 1400 et seq.

requirements are carried out in local school districts, all states, including Vermont, have developed extensive state regulations and procedures to ensure its enforcement.⁶ This handbook provides information on issues that commonly arise in the context of Section 504. As the issues are discussed, it will be apparent to the reader that the most difficult questions tend to involve specific and unique fact situations. Resolution often requires an analysis of the specific facts in each case. It is important to note, therefore, that **this manual is not a substitute for an individual analysis of each case** and, when necessary, consultation with a knowledgeable attorney or other person with experience in dealing with Section 504 issues.

SUMMARY OF SECTION 504

Section 504 prohibits discrimination on the basis of disability. The Rehabilitation Act itself states the nondiscrimination standard:

*"No otherwise qualified individual with a disability in the United States...shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."*⁷

The regulations adopted by the U.S. Office for Civil Rights (OCR) to govern the enforcement of Section 504 elaborate on this standard by prohibiting certain "discriminatory actions." Among the **actions prohibited by the regulations** are the following:

1. denying a qualified person "the **opportunity to participate** in or benefit from the aid, benefit or service..." provided by an entity covered by the Act;
2. affording a qualified person an "opportunity to participate...that is **not equal** to that afforded others;"
3. providing a qualified person with "an aid, benefit, or service that is **not as effective** as that provided to others;"
4. providing "different or **separate**...benefits or services to handicapped persons or to any class of handicapped persons⁸ unless

⁶ See Vermont State Board of Education Manual of Rules and Practices, Rules 2360-2369; 4313.

⁷ 29 U.S.C. § 794(a).

⁸ The term "handicapped" is used in the Federal regulations, while the Act itself has been amended to use the more current term "disabled."

such action is necessary...to provide benefits or services ...that are as effective as those provided to others;"

5. otherwise limiting "a qualified handicapped person in the **enjoyment of any right, privilege, advantage, or opportunity** enjoyed by others."⁹

DEFINITIONS

Terms Used in Section 504 and its Implementing Regulations

An individual with disabilities (or a "handicapped" person) is one who:

- has a **physical** or **mental** impairment which **substantially limits** one or more **major life activities**;
- has a **record** of such an impairment; or
- is **regarded as** having such an impairment.

Whether an impairment "substantially limits" a major life activity may be difficult to determine. The effect of an impairment on a major life activity is measured by comparing the individual's ability to that of an average person in the general population. In the case of a student, this means that the effect of an impairment should be determined by comparing the student's ability to that of other students in his or her age or grade generally, not merely to other students in the same classroom, or even in the same school. OCR has said that a student with an impairment who is **nevertheless succeeding in regular education** cannot be viewed as substantially limited in the major life activity of learning. On the other hand, a student who is **advancing from year to year while functioning further and further below expected norms** for his or her age may be substantially limited.¹⁰

Moreover, the United States Supreme Court has interpreted the "substantially limits" standard in the Americans With Disabilities Act (ADA) in a series of opinions that can serve as precedent in 504 cases. This is because the ADA's definition of disability is based on Section 504's definition. The first cases held that, when determining ADA eligibility, **the "substantial limitation" standard must be considered after mitigation of the impairment**, if any, has taken place. A person who has a visual impairment, for example, the effect of which is eliminated by the use of eyeglasses, is not eligible for ADA accommodations because the impairment is not one that substantially limits a major life activity.¹¹ Although these cases

⁹ 34 C.F.R. § 104.4(b).

¹⁰ See Saginaw City School District, EHLR 352:413 (OCR 1987).

¹¹ See Sutton and Hinton v. United Airlines, Inc., 527 U.S. 471, 30 IDELR 681 (1999); Murphy v. United Parcel Service, Inc., 527 U.S. 517, 30 IDELR 694 (1999).

address discrimination claims brought under the ADA and not Section 504, it is very likely that the same standard would apply in the case of a student covered by Section 504.

More recently, the United States Supreme Court ruled that determining whether the major life activity of work is substantially limited under the ADA by a person's carpal tunnel syndrome must involve an analysis of the syndrome's **effect on work generally**, not merely on the tasks required for a particular job.¹² It is difficult to predict how this reasoning might effect future Section 504 cases involving the major life activity of learning. Clearly, however, it is important to consider whether a disability's impact on a student's ability to learn is sufficient to affect more than a narrow aspect of the learning process. For example, a student whose nervous disorder effects his or her handwriting might not be eligible for Section 504 accommodations without indications that the disability effects a broader range of skills needed to learn effectively.

A physical or mental impairment is:

1. any **physiological** disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or
2. any **mental or psychological** disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

Major life activities are:

those functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, **learning**, and working.

Has a record of such an impairment means:

a **history of**, or has been **misclassified** as having, a mental or physical impairment that substantially limits one or more major life activities.

Is regarded as having an impairment means:

1. has a physical or mental impairment that does not substantially limit major life activities but that **is treated by a recipient as constituting such a limitation**;

¹² Toyota v. Williams, 122 S.Ct. 681 (2002).

2. has a physical or mental impairment that substantially limits major life activities only as a **result of the attitudes of others** toward such impairment; or
3. has **none of the impairments** defined above but is **treated by a recipient** as having such an impairment.

The Office of Civil Rights has stated that the definitions of "**having a record of an impairment**" or "**regarded as having an impairment**" relate primarily to the employment context or to admissions criteria and not to issues of a free appropriate public education or reasonable accommodations.

The programmatic, or "FAPE" requirements of Section 504¹³ apply to students who are currently disabled. The nondiscrimination requirements apply to students who, although not currently disabled, are believed to be disabled and are denied benefits as a result. They also apply to students who were disabled in the past and denied benefits as a result of their past disability. It would be unlawful discrimination, for example, to deny a student who had recovered from a disabling condition the opportunity to participate on an equal basis with other students in a school's athletic activities.¹⁴

Recipient means:

a state or local public agency or private entity that receives federal financial assistance **either directly or through another recipient**. For example, an independent school that receives federal funds from a public school district is a "recipient," as is the public school district.

Qualified individual with disabilities means:

1. with respect to **students**, a person who is **eligible to enroll** in a public or independent school. In Vermont, there is no upper age limit to the entitlement to public education. A person is entitled to attend a public school in Vermont until that person earns a high school diploma, regardless of how old he or she may be.¹⁵
2. with respect to **employees**, a person who, with reasonable accommodation, can **perform the essential functions** of the job in question.

¹³ See also "Substantive School District Obligations..." *infra*.

¹⁴ See, OCR Senior Staff Memorandum, 19 IDELR 894 (OCR 1992).

¹⁵ 16 V.S.A. § 1073(b).

A **public school** must provide a free appropriate public education to any **student** who is an individual with disabilities as defined above. **Parents and family members** who have a disability are also protected by Section 504 and the ADA and have a right to reasonable accommodations and services that will allow them to have an equal opportunity to participate in school sponsored activities.

Program or activity means:

All programs or activities of the Vermont Department of Education and all schools and school districts receiving federal funds **regardless of whether the specific program or activity involved is a direct recipient of federal funds**. If a district contracts with alternative education programs, or independent/private schools, the district must insure that a student with disabilities has an equal opportunity to participate in alternative education, even if the programs or private schools themselves do not receive any federal funds.¹⁶

Parental Responsibilities to Pay for Accommodations. When a Vermont school district pays tuition to an independent school on behalf of a resident student, the cost of accommodations to the student's program required by Section 504 may not be charged to the parents of that student. OCR has indicated that an independent school may include the cost of Section 504 accommodations in its regular tuition charge. Under Vermont law, the resident district of the student would then be obligated to pay the tuition amount allowed under the tuition statutes.¹⁷ If the independent school bills the cost of accommodations separately, the district of residence and the independent school must determine whether, under any applicable agreement they may have, the separate charge will in fact be paid by the resident district. Section 504 does not dictate an answer to this question. OCR has advised that it is a matter for the sending district and receiving school to resolve. It may be resolved in any manner, so long as the parents are not required to pay the additional amount, and so long as there is **no delay in providing needed services** to the child.¹⁸

Parental Placement of Children in Independent Schools. If parents place a child in a recipient independent school, the school may add a surcharge, or increase its tuition charge, to pay for the cost of providing Section 504 accommodations. The Section 504 regulations limit the amount of this charge somewhat. The regulations provide that an independent school may not charge more for the provision of an appropriate education to students with disabilities than to nondisabled students "**except to the extent that any additional charge is justified by a substantial increase in costs.**"¹⁹

¹⁶ 34 C.F.R. §104.3(f); Civil Rights Restoration Act of 1988 (PL 100-259); 29 U.S.C. § 794(b)(3)(A)(ii).

¹⁷ 16 V.S.A. §§ 823 and 824.

¹⁸ Letter to Yudien, March 7, 2000 (OCR).

¹⁹ 34 C.F.R. § 104.39(b).

The FAPE Requirement in Independent Schools. The obligation of a recipient independent school to provide FAPE to a student placed at the school by his or her parents is also limited by the Section 504 regulations. The regulations prohibit independent schools from excluding students with disabilities for whom they are able to provide an appropriate education with "minor adjustments."²⁰ An "appropriate education" is defined for these purposes as "the provision of regular or special education and related aids and services that are (1) designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped person are met and (2) are based upon adherence to procedures that satisfy the requirements of (Section 504)."²¹

SECTION 504 AND THE IDEA

The IDEA lists disabling conditions that entitle a child to special education. Additionally, in order to be entitled to receive services under the IDEA and Vermont law, the disabling condition must have an adverse effect on a student's education²² and result in a need for special education.²³

Eligibility for Section 504 is not limited to listed disabling conditions. Students may be disabled and eligible under Section 504, but not under the IDEA. However, if a child is eligible for special education, he or she will also be protected under Section 504. The regulations also make clear that certain conditions, such as drug or alcohol addiction or heart disease, which would not be considered disabilities under the IDEA, may be disabilities under Section 504. While Section 504 requires that the condition "substantially limit a major life activity," it need not necessarily adversely affect the student's educational performance in order to qualify him or her for Section 504 accommodations in the school setting.

Examples of potentially qualifying disabilities under Section 504 that may not typically be covered under the IDEA are:

1. Communicable diseases: AIDS, AIDS related complex (ARC) or asymptomatic carriers of the AIDS virus (HIV), tuberculosis;
2. Temporary disabling conditions: Students injured in accidents, suffering short-term illnesses, or broken bones;

²⁰ 34 C.F.R. § 104.39(a).

²¹ 34 C.F.R. § 104.33(b).

²² Vermont State Board of Education Manual of Rules and Practices, Rule 2362(c).

²³ "Special education" is "specially designed instruction that cannot be provided within the school's standard instructional conditions or provided through the school's educational support system." *Id.*, Rule 2360.3.1.

3. Attention Deficit Disorder - Attention Deficit Hyperactivity Disorder (ADD-ADHD) where the adverse effect on educational performance required for special education eligibility is not shown;
4. Chronic asthma and severe allergies;
5. A physical condition such as spina bifida, hemophilia and conditions requiring children to use crutches, wheel chairs or other assistive devices;
6. Diabetes.

When it comes to the **provision of "accommodations" or "related aids and services,"** there is little distinction between IDEA and Section 504. According to the Federal regulation that defines a free appropriate education for Section 504 purposes, a school must provide:

regular or special education and related aids and services that...are designed to meet individual educational needs of disabled persons as adequately as the needs of nondisabled persons are met .²⁴

The IDEA provides a non-exclusive list of **"related services."**²⁵ Section 504 does not provide such a list, but services such as counseling, transportation and residential placements are specifically mentioned in the Section 504 regulations, in addition to "nonacademic and extracurricular services".²⁶

Transition services, explicitly required for certain students by the IDEA since 1990, are not required by the Section 504 regulations. Under the IDEA, transition services are described in a student's IEP.

The "reasonable accommodation" requirement of Section 504.

Employers

The federal regulations provide that *employers* are required to "...make reasonable accommodations to the known physical or mental limitations of an otherwise qualified

²⁴ 34 C.F.R. 104.33. *See also* "Substantive School District Obligations..." *infra*.

²⁵ *See Vermont State Board of Education Manual of Rules and Practices*, Rule 2360.3.2; 34 C.F.R. § 300.24(a).

²⁶ 34 C.F.R. §§ 104.33(c)(2)&(3) and 104.37.

handicapped applicant or employee *unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of the program or activity.*"²⁷

Independent Schools and Postsecondary Institutions

This limitation was found to "implicitly" apply to postsecondary institutions as well as to employers by the United States Supreme Court in 1979.²⁸ The Section 504 regulations limit the obligation to alter programs in independent schools by requiring that independent school programs must be available to qualified individuals so long as only "minor adjustments" are needed to make the programs accessible.²⁹

Public Elementary and Secondary Schools

The same limitation on the reasonable accommodation requirement does not appear in the Section 504 regulations related to public elementary and secondary schools, however, and the Office for Civil Rights has consistently maintained that public elementary and secondary schools must provide academic program accommodations to eligible students regardless of their cost.³⁰ When two accommodations would each be adequate to meet the FAPE standard, the lower cost accommodation may be chosen.

DISCRIMINATION UNDER SECTION 504

Discrimination under Section 504 occurs when a recipient:

1. **Denies a person with a disability the opportunity to participate in or benefit from an aid, benefit or service that is afforded nondisabled students.** For example, disabled students may not be denied credit on the basis of poor attendance when their absences are caused by their disability. Nor may a school expel or impose a long-term suspension on a student for misconduct that is a manifestation of the student's disability.³¹

One area of frequent concern is how to include disabled students in **academic recognition programs**. In 1996, the Office for Civil Rights clarified its position on issues related to grading and awarding academic honors to students with disabilities. In general, OCR states that school districts should recognize academic accomplishments by disabled students. OCR does not require, however, that, in doing so, districts

²⁷ 34 C.F.R. § 104.12(a). (Emphasis added)

²⁸ Southeastern Community College v. Davis, 442 U.S. 397, EHLR 551:177 (1979).

²⁹ 34 C.F.R. § 104.39(a).

³⁰ Letter to Zirkel, 16 ELHR 1177 (OCR 1990).

³¹ See "Questions and Answers on Discipline" *infra*.

significantly alter their standards for receiving honor roll or class rank distinctions. For example, OCR offers the following advice to school districts.

- A. Eligibility for **honor roll** and academic awards cannot be denied automatically on the basis of disability status under IDEA or Section 504.
 - B. A student's **permanent transcript** may include notations showing that the curriculum for the student has been modified. This would include modifications to a standards-based curriculum, for example. A transcript may not, however, include notations that show how instruction may have been modified for a student who is disabled.
 - C. The use of eligibility standards for **class ranking** or honor roll designation is permitted, but the standards must be objective, and must not arbitrarily exclude disabled students. For example, grades may be weighted for certain advanced classes, but students with disabilities may not be arbitrarily excluded from those classes.³²
2. **Fails to afford a disabled person an opportunity to participate in or benefit from an aid, benefit, or service that is equal to that afforded others.** For example, Section 504 requires that disabled students be provided an equal opportunity to participate in **extracurricular activities**.³³ Providing an equal opportunity does not mean that the standards of participation must be altered for students with disabilities. It means that disabled students must be given an equal opportunity to meet the participation requirements of athletic or other extracurricular activities. If an accommodation will allow a disabled student to participate in an activity, it may be required, although, unlike accommodations to academic programs required to provide a FAPE, there is a limit to the extent to which a school must alter its non-academic program through an accommodation. The general rule is that a school need not "fundamentally alter the nature of a program" in order to allow participation by a disabled student.³⁴

³² Letter to Runkel, 25 IDELR 387 (OCR 1996).

³³ 34 C.F.R. § 104.37(a)(1).

³⁴ OCR has stated that "(p)roviding extra supervision to a handicapped child ordinarily will neither change the fundamental nature of the program or unduly burden a recipient." At the same time, OCR acknowledges that "considerable discretion" should be given to "recipients in determining what supplemental services are necessary in a particular case, since the Section 504 regulation provides no specific guidance." See OCR SENIOR STAFF MEMORANDA, "Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance," 17 EHLR 1233 (OCR 1990).

3. **Fails to provide aids, benefits, or services to a person with a disability that are as effective** as those provided to nondisabled persons.³⁵ **"Equally effective"** means equivalent as opposed to identical. Moreover, to be equally effective, an aid, benefit or service need not produce equal results; it must merely afford an equal opportunity to achieve equal results. This is referred to by OCR as the "commensurate opportunity standard," and it is applied to both services and facilities³⁶.
4. **Provides different or separate aids, benefits or services unless such action is necessary** to be as effective as the aids, benefits or services provided to nondisabled students.³⁷ Although separate or different aids, benefits or services are not necessarily unlawful, a school district will generally have to justify such non-uniform treatment if OCR is asked to investigate a complaint on these grounds.
6. **Aids or perpetuates discrimination** by providing significant assistance to an agency, organization or person that discriminates on the basis of disability.³⁸ For example, a school would violate this standard if it sponsored student organizations that exclude persons with disabilities.

OCR also found a violation of this standard when it reviewed the Milwaukee, Wisconsin school choice program in 1990. Although many of the schools involved in that program were **private parochial schools** that received no federal funds directly, OCR found them to be subject to Section 504 because the choice program itself was subsidized by a covered entity--the state. Since the Section 504 regulations do not allow a covered entity to contract or "enter into arrangements" with any other entity that discriminates against qualified individuals with disabilities, the state was obligated to ensure that all schools participating in the choice program complied with Section 504 requirements.³⁹

6. **Denies a person with disabilities the opportunity to participate as a member of a planning or advisory board strictly because of his/her disability.**⁴⁰ This provision was placed in the Section 504 regulations in order to ensure that qualified persons with disabilities have opportunities to serve on planning and advisory boards responsible for guiding federally funded programs or activities.⁴¹

³⁵ 34 C.F.R. § 104.4(b)(1)(iii).

³⁶ 34 C.F.R. §104.4(2).

³⁷ 34 C.F.R. § 104.4(b)(1)(iv).

³⁸ 34 C.F.R. § 104.4(b)(1)(v).

³⁹ OCR Staff Memorandum, 22 IDELR 669 (OCR 1990).

⁴⁰ 34 C.F.R. § 104.4(b)(1)(vi).

⁴¹ See 34 C.F.R. Part 104, Appendix A.

7. **Otherwise limits the enjoyment of any right, privilege, advantage or opportunity enjoyed by others.**⁴² A school district should not, for example, prohibit a person with a physical disability from using a service dog at school.
8. **In determining the site or location of a facility, makes selections, which effectively exclude persons with disabilities, denies them the benefits of, or otherwise subjects them to discrimination.**⁴³ This provision would be violated if a school district placed disabled students in inferior facilities, or unnecessarily restrictive classrooms due to a lack of classroom space.

The Section 504 regulations include a "**comparable facilities**" requirement that is specific to educational settings. The first rule stated by the regulations is that a student with a disability must be educated "with persons who are not (disabled) to the maximum extent appropriate to the needs of the (disabled) person."⁴⁴ Only when it is "...demonstrated by the recipient that **the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily**" may the recipient choose a setting other than the regular education environment.⁴⁵ If separate facilities are provided for disabled students because they are necessary to provide an appropriate education, the regulations require that the separate facilities "...and the services and activities provided therein (be) **comparable** to the other facilities, services and activities of the recipient."⁴⁶

9. **Fails to adequately respond to allegations that a disabled student has been harassed on the basis of his or her disability.**⁴⁷ Harassment of students based on disability, or failure to respond to allegations of disability-based harassment, are also potential violations of the ADA and Vermont law.⁴⁸

PROCEDURAL REQUIREMENTS OF SECTION 504

To be in compliance with Section 504, school districts **MUST** do the following:

⁴² 34 C.F.R. § 104.4(b)(1)(vii).

⁴³ 34 C.F.R. § 104.4(b)(5).

⁴⁴ 34 C.F.R. § 104.34(a).

⁴⁵ *Id.*

⁴⁶ *Id.* at § 104.34(c).

⁴⁷ *See, e.g., Nordinia Hills (OH) City School District*, 25 IDELR 233 (OCR 1996); *Willamina (OR) School District* 30-I, 27 IDELR 221 (OCR 1997).

⁴⁸ Vermont school districts and independent schools are required to have policies prohibiting harassment. 16 V.S.A. §§ 166 & 565.

1. **Provide written assurance of nondiscrimination** whenever the district applies for federal financial assistance for a program subject to Section 504.⁴⁹
2. **Designate an employee to coordinate compliance** with Section 504.⁵⁰ It is not necessary to appoint a coordinator for each school building in a district that operates more than one school, but the district must identify a coordinator, and must provide that person's name and telephone number on notices of nondiscrimination discussed in paragraph (4) below.
3. **Provide grievance procedures to resolve complaints** of discrimination.⁵¹ Grievance procedures must "incorporate due process standards and...provide for the prompt and equitable resolution of complaints."⁵² OCR has ruled in complaint investigations that procedures that include reasonable time frames, an opportunity to present evidence, notification of the findings and an appeal process are sufficient to comply with this regulatory requirement.⁵³

A grievance procedure like that afforded to parents under the Family Education Rights and Privacy Act (FERPA) for resolving disputes about student records would suffice. Such a procedure could lead to an impartial hearing provided by the school district. See Appendix E for sample school board procedures establishing a grievance procedure.

4. **Provide notice** to students, parents, employees, unions, and professional organizations that the **school district does not discriminate** in admission or access to, or treatment or employment in, its programs or activities. Notice must also name the school district's Section 504 coordinator. This notice must be included in "materials or publications containing general information (made) available to participants, applicants, or employees."⁵⁴ For example, notice complying with this requirement should be included in any handbooks distributed to students, parents, or employees. See **Appendix F** for a sample notice of nondiscrimination provided by OCR.
5. At least annually, "...**undertake to identify and locate all Section 504 qualified disabled children in the district's geographic area** who are not receiving a public education; and take appropriate steps to notify (disabled) persons and their parents...of the (school district's) obligations under Section 504."⁵⁵ This requirement is similar to, and

⁴⁹ 34 C.F.R. § 104.5(a).

⁵⁰ 34 C.F.R. § 104.7(a).

⁵¹ 34 C.F.R. § 104.7(b).

⁵² *Id.*

⁵³ *See, e.g. Hayward (CA) Unified School District*, 23 IDELR 107 (OCR 1995).

⁵⁴ 34 C.F.R. § 104.8(a).

⁵⁵ 34 C.F.R. § 104.32.

may be met in conjunction with, the "**child find**" requirements of the IDEA. The Section 504 regulations do not specify the manner in which a district must conduct child find activities with regard to students not enrolled in its schools. Many districts comply by placing notices in newspapers and in area independent schools.

6. **Provide parents and guardians with** the following:

a. **Notice of their rights.**

- b. **An opportunity to review relevant records.**⁵⁶ OCR has generally held that "relevant records" are any records subject to the Family Education Rights to Privacy Act (FERPA). In two instances, however, OCR has expanded the meaning of "relevant records" to include test protocols and notes taken by examiners and used to evaluate and determine placement for students who are, or are believed to be, disabled.⁵⁷

- c. **An impartial hearing.**⁵⁸ The Vermont State Board of Education Manual of Rules and Practices includes a regulation governing the due process hearing procedure under Section 504.⁵⁹ Parents or guardians must be notified of the right to request a hearing regarding the identification, evaluation, or educational placement of students with disabilities. Unlike the IDEA, Section 504 does not have an explicit "**stay put**" provision. "Stay put" operates in the special education context to require that a student be maintained in his or her current educational placement when his or her parent contests a proposed change of placement by filing a request for a due process hearing.⁶⁰

Although the Section 504 regulations do not contain a similar requirement, OCR has advised that, in its view, "**stay put**" is inherent to the procedural safeguards requirements of Section 504. In a 1995 response to an inquiry on this point, OCR observed that, "(A)lthough the Section 504 regulation contains no...specific 'stay put' requirement, the Section 504 regulation does require school districts to provide procedural safeguards to students and their parents or guardians regarding the identification, evaluation and placement of students with disabilities..." From this requirement, concluded OCR, follows an implied "stay put" requirement. "To say that a school district can go ahead and implement a change of placement, even

⁵⁶ 34 C.F.R. § 104.36.

⁵⁷ See, Allegheny (PA) Intermediate Unit, 20 IDELR 563 (OCR 1993); St. Charles (IL) Community School District #303, 17 EHLR 18 (OCR 1990).

⁵⁸ 34 C.F.R. § 104.36.

⁵⁹ Vermont State Board of Education Manual of Rules and Practices, Rule 1253.

⁶⁰ 34 C.F.R. § 300.514.

though the parent has a right to challenge the change, seems to undermine the rights given by due process. Thus, **OCR believes that fair due process system would encompass the school district waiting for the results of the process before making the change.**"⁶¹

SUBSTANTIVE SCHOOL DISTRICT OBLIGATIONS FOR ELEMENTARY AND SECONDARY EDUCATION

1. Free Appropriate Public Education

The Section 504 regulations obligate public elementary and secondary school districts to "provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap."⁶² Under Vermont law, **legal residency determines whether a student is within a school district's jurisdiction.** The residence of a minor Vermont student for educational purposes is generally where either of his or her parents legally reside.⁶³ If a student resides with one parent, but attends school in the district of his or her other parent's residence, the district of attendance is the district responsible for providing a FAPE.

Those familiar with the requirements of IDEA will notice the similarity in the reference to FAPE. However, **the Section 504 standard of what is "appropriate" differs from the IDEA "appropriate" standard.** The IDEA requires a program reasonably calculated to provide educational benefit. Under Section 504, an appropriate program must be **individually designed to meet the needs of the student as adequately as the needs of nondisabled students are met.**⁶⁴ For example, a policy of providing one hour per day of homebound instruction to all persons with disabilities would violate this standard because it fails to consider the individual needs of students. The Section 504 FAPE standard also requires that teachers be trained in the instruction of persons with the particular disabilities they are assigned to teach, and appropriate materials and equipment must be available.

Although Section 504 does not require a school district to develop an IEP with annual goals and objectives for a student eligible under Section 504, **it is recommended that the district document in writing that the 504 Team met and arrived at the agreed-**

⁶¹ Letter to Zirkel, 22 IDELR 667 (OCR 1995).

⁶² 34 C.F.R. § 104.33(a).

⁶³ 16 V.S.A. § 1075(a). See this statute for residency criteria for independent students and other students for whom the residence of the student's parents is not the determining factor.

⁶⁴ See 34 C.F.R. Part 104 Appendix A, § 23. "The quality of the educational services provided to handicapped students must equal that of the services provided to nonhandicapped students..."

upon services. The resulting Section 504 "Plan" must be reviewed and updated at least annually. The use of an IEP is one means of meeting the Section 504 standards.⁶⁵

a. Transportation

If a district places a student in a program not operated by the district, the district must assure that adequate transportation to and from the program is provided at no greater cost than the parent would have paid to transport the child to the district.⁶⁶ If a district provides transportation to all its students within a certain geographic area, it may not discriminate in its provision of transportation to students with disabilities.⁶⁷

b. Residential Placement

The Section 504 regulations provide that "(I)f placement in a public or private residential program is necessary to provide a free appropriate public education to a person with a disability because of his or her disability, the program, including nonmedical care and room and board, shall be provided at no cost to the person or his or her parent or guardian."⁶⁸ Under Section 504, such a placement would be required only when it is shown that the student cannot receive an appropriate program any other way.

c. Unilateral Out-of-District Placements

If the district offers a free appropriate public education to a student but the parent chooses to place the child elsewhere, the district is not responsible to pay for the placement chosen by the parent.⁶⁹ This is substantially the same as the unilateral placement provision in the IDEA.⁷⁰ If a district's program is appropriate and a parent places a child in an independent school, the district is not responsible for the student's tuition, nor is the school district required to provide the special education or Section 504 component in the independent school setting.

The Section 504 regulations also provide that, when there is a **disagreement between a parent and a school district** about whether the district has made a FAPE available, or has met its financial responsibilities, the disagreement should

⁶⁵ 34 C.F.R. § 104.33(b)(2).

⁶⁶ 34 C.F.R. §104.33(c)(2).

⁶⁷ 34 C.F.R. §104.4(b)(i).

⁶⁸ 34 C.F.R. §104.33(c)(3).

⁶⁹ 34 C.F.R. § 104.33(c)(4).

⁷⁰ 34 C.F.R. § 300.403(a).

be resolved through a due process hearing.⁷¹ A school district may provide Section 504 services at an independent school, or at other agreed upon locations, as long as the parents and district agree, and there are no other legal constraints--such as those that might be imposed by a placement in a religious school.

d. Extended School Year Services

The IDEA regulations of 1999 require that extended school year (ESY) services be provided to special education students when IEP teams make individually based determinations that such services are necessary.⁷² The Section 504 regulations do not address the provision of ESY services for students who are eligible only under Section 504. In a small number of instances, OCR has interpreted the Section 504 regulations to require the provision of ESY services, but only when the individual needs of a student are considered and shown to require an extended school year in order to provide a FAPE.⁷³

When a school district provides extended school year programs to students generally, it may not exclude disabled students from those programs on the basis of their disabilities. Nor may a district provide ESY services to students with certain disabilities while excluding students with other disabilities.⁷⁴

2. Evaluations

- a.** The Section 504 regulations require that, if a student "**needs or is believed to need** special education or related services," the district must evaluate the student prior to initial placement in a regular or special education program and before any "significant change in placement."⁷⁵

An evaluation meeting particular criteria is not required when neither the district nor the parents believe that the child is in need of special education or related services. However, the district should have current medical or other information in order to make needed accommodations to the student's program.

- b.** The district must **establish policies and procedures** for evaluation and placement that assure that tests and other evaluation materials:

⁷¹ 34 C.F.R. § 104.33(c)(4).

⁷² 34 C.F.R. § 300.309.

⁷³ See, e.g., Baltimore City (MD) Public Schools, EHLR 352:185 (OCR 1989).

⁷⁴ See, e.g., Seattle (WA) School District, EHLR 352:375 (OCR 1987).

⁷⁵ 34 C.F.R. § 104.35(a).

- are administered by **trained personnel** and valid for the purpose of the evaluation;
 - are tailored to assess educational need and are **not merely based on IQ scores**;
 - **reflect ability to learn or achievement or whatever else the tests intend to measure** and do not reflect the student's impaired sensory, manual or speaking skills (unless the test is designed to measure these particular deficits).⁷⁶
- c. Unlike the IDEA, there is no right to an **independent evaluation** under Section 504. Although school districts are not required by Section 504 to fund independent evaluations, a school district should consider independent evaluations provided by parents when interpreting evaluation data and making placement decisions. In at least one instance, the Office for Civil Rights has said that meeting the regulatory requirement that "...information from a variety of sources..." be considered when making placement decisions obligates a district to **consider an independent evaluation obtained by a parent**.⁷⁷

3. Placement Procedures

As under the IDEA, in interpreting evaluation data and making placement decisions, the district must:

- a. draw upon **information from a variety of sources**.
- b. assure that all information is **documented and considered**.
- c. ensure that the placement decision is made by **a group of** persons including those who are **knowledgeable about the child**, the **meaning of the evaluation data** and **placement options**.
- d. ensure that the student is **educated with his/her nondisabled peers** to the **maximum extent appropriate**.⁷⁸

⁷⁶ 34 C.F.R. §104.35(b).

⁷⁷ Randolph (MA) Public School, 21 IDELR 816 (OCR 1994).

⁷⁸ 34 C.F.R. §104.35(c).

4. **Reevaluations**

Section 504 requires "**periodic**" **reevaluations**. Unlike the IDEA, Section 504 contains no specified time frame. However, school districts will be in compliance if they utilize reevaluation procedures "consistent with the IDEA."⁷⁹ Additionally, Section 504 requires a reevaluation before any significant change in placement.⁸⁰

Although the term is not defined in the Section 504 regulations, OCR has defined "**significant change in placement**" as a substantial and fundamental change in a student's educational program.⁸¹ While a change from a mainstream classroom to a restrictive resource room for a majority of the school day would clearly constitute a significant change,⁸² a change in instructional methods not specified in a Section 504 plan would not.⁸³ As a general rule, a student who will receive the same services in a new environment will not experience a significant change in placement.⁸⁴

One change of placement that does not require the re-evaluation of a 504 student is **graduation from high school**. The requirement that a special education re-evaluation take place prior to the graduation of a special education student was removed from the IDEA and its regulations in 1997 and 1999 respectively. Prior to 1997, OCR had said that while it considered it "advisable" that a "formal" determination of eligibility for graduation be made by a Section 504 student's "evaluation team," it acknowledged that this was not a requirement of Section 504.⁸⁵

5. **Least Restrictive Environment**

In order to remove a child with a disability from the regular educational environment, a district must demonstrate that education of the student in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily.⁸⁶ When a student is educated in a self-contained environment with other disabled students, consideration must be given to providing extracurricular activities and services, including meals and recess, in a mainstream setting.⁸⁷ Again, the decision to remove a student from

⁷⁹ 34 C.F.R. §104.35(d).

⁸⁰ *Id.*

⁸¹ Harlowton (MT) Public Schools, 26 IDELR 1156 (OCR 1997).

⁸² *See, e.g., Fairbanks (AK) North Star Borough Sch. Dist.*, 22 IDELR 856 (OCR 1994).

⁸³ *See, e.g., Montebello (CA) Unified Sch. Dist.*, 20 IDELR 388 (OCR 1993).

⁸⁴ 34 C.F.R. Part 104 Appendix A, § 25.

⁸⁵ Letter to Runkel, 25 IDELR 387 (OCR 1996).

⁸⁶ 34 C.F.R. § 104.34(a).

⁸⁷ 34 C.F.R. § 104.34(b).

the mainstream setting must be **based on an analysis of the individual student's needs.**⁸⁸

6. Nonacademic Services

Districts must provide **equal opportunity** in areas such as counseling, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to other agencies and employment.⁸⁹

7. Program Accessibility

Section 504 makes the exclusion of individuals with disabilities a form of unlawful discrimination when the exclusion is due to inaccessible facilities.⁹⁰ Moreover, Section 504 defines the term "facility" rather broadly to include "...all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property."⁹¹ However, **the age of a facility will determine the extent to which alterations will be required to make it fully accessible.**

Facilities constructed **prior to June 3, 1977**⁹² need not necessarily be made accessible so long as the program or activity, considered overall, is readily accessible to persons with disabilities. It would not be necessary to make every school in a district accessible. However, the student must be afforded an equal opportunity to enjoy the full range of services offered by the district. If a district runs one school with a specialized program, students may not be denied access to the program merely because of accessibility problems. For example, if a school district's orchestra/band has its weekly rehearsals at a particular school location, that location must be accessible.

A district can redesign equipment, reassign classes or other services to accessible buildings, assign aides to students, deliver services at alternate accessible sites, or alter existing facilities. So long as there are other methods that are as effective in achieving ready access, a district need not undertake structural changes to a building.⁹³

⁸⁸ See, e.g., Montgomery Count (MD) Pub. Sch., 19 IDELR 43 (OCR 1992).

⁸⁹ 34 C.F.R. § 104.37. See also "Discrimination Under Section 504" *infra*.

⁹⁰ 34 C.F.R. § 104.22. "No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, or be excluded from participation in, or otherwise be subjected to discrimination under any program or activity...."

⁹¹ 34 C.F.R. § 104.3(i).

⁹² This is the effective date of the Section 504 regulations. Note that the Americans With Disabilities Act (ADA) makes facilities constructed before January 26, 1992 "existing facilities" subject to more limited accessibility requirements. 28 C.F.R. § 35.150.

⁹³ 34 C.F.R. § 104.22(b).

Buildings or additions constructed **after June 3, 1977** must be designed and constructed to allow persons with disabilities to access and use them readily.⁹⁴ For example, multilevel buildings should have ramps or elevators, accessible bathrooms, doorways constructed wide enough for wheelchairs. Contractors should be familiar with accessibility requirements.

To the maximum extent feasible, all facilities altered after June 3, 1977, must be altered to allow accessibility and usability by persons with disabilities.⁹⁵ For example, if a school district adds on a wing to a building, the wing must be made accessible. Or, if a storage room is modified into a classroom, modifications, such as widening the doorway, must be made.

This provision covers the occasional instance where the nature of an existing facility is such as to make it impractical or prohibitively expensive to renovate in a manner that results in its being entirely accessible. However, in all of these instances, the alteration should provide the maximum amount of physical accessibility that is feasible.⁹⁶

For Office for Civil Rights further technical assistance on the facilities requirements of Section 504, contact OCR at:

Office for Civil Rights
U.S. Department of Education
J.W. McCormack Post Office & Courthouse
Post Office Square
Boston, MA 02109
617-223-9662

STUDENTS ADDICTED TO OR CURRENTLY USING ILLEGAL DRUGS OR ALCOHOL

A student who is an **alcoholic** may be a person with a disability for purposes of Section 504 if his or her impairment substantially limits one or more major life activities. A school district therefore has an obligation to provide an appropriate education to that student, including reasonable accommodations made necessary by the disability.⁹⁷

⁹⁴ 34 C.F.R. § 104.23(a).

⁹⁵ 34 C.F.R. § 104.23(b).

⁹⁶ Appendix A to 34 C.F.R. Part 104, comment to § 104.23(b).

⁹⁷ OCR Staff Memorandum, 17 EHLR 609 (OCR 1991); Pinellas County (FL) School District, 20 IDELR 561 (OCR 1993).

If a district suspects that a student's alcohol problem may be substantially limiting the major life activity of learning, the district must seek an evaluation at district expense. OCR has stated that **parental consent** must be obtained prior to conducting an initial student evaluation.⁹⁸ If the evaluation verifies the existence of a disability condition (alcoholism) which substantially limits a major life activity, the student is considered disabled under Section 504.

The district must then follow the rest of the evaluative and planning procedures of Section 504. While counseling may be a component of a plan under the IDEA or Section 504, school districts are not required to pay for medical treatment programs for alcohol or drug abuse. However, while a student is hospitalized for such a treatment, the school district may be required to continue the student's educational or special educational program.

A school district is **entitled to enforce its rules** prohibiting the use, sale or possession of drugs or alcohol by drug or alcohol-addicted students, provided that the rules are enforced evenly with respect to all students.⁹⁹

The Americans with Disabilities Act (ADA) amended Section 504 to make students who are **current users** of illegal drugs ineligible for Section 504 protections when a school district acts on the basis of such use.¹⁰⁰ This exclusion relates only to current users of illegal drugs, not to students who are addicted to illegal drugs but are not current users of illegal drugs. For example, it does not apply to students who are participating in drug rehabilitation programs and are not currently using illegal drugs.¹⁰¹

It is also important to recognize that the exclusion applies only when the district is acting on the basis of the student's use of illegal drugs. An "illegal drug" is any controlled substance included in the Controlled Substances Act.¹⁰² Marijuana is a controlled substance under the Act.

The exceptions for current use of illegal drugs apply to employees of school districts as well as to students. Before the ADA amendments, employers were required by OCR policy to treat alcoholism and drug addiction as disabilities in the sense that they could not be used as the sole basis for making negative employment decisions. Rather, employers were obligated to consider when the condition of addiction or alcoholism prevented a person from successfully performing a job. Only if the employer could show that this was the case, could the employer deny an employment opportunity to that person.¹⁰³ This policy position was changed after the ADA

⁹⁸ Letter to Durham, 27 IDELR 380 (OCR 1997).

⁹⁹ See Vermont State Board of Education Manual of Rules and Practices, Rule 4312.

¹⁰⁰ 29 U.S.C. 705(20)(c); Letter to Zirkel, 22 IDELR 667 (OCR 1995).

¹⁰¹ *Id.*

¹⁰² 21 U.S.C. § 812.

¹⁰³ 34 C.F.R. Part 104, Appendix A.

amendments to Section 504. The Office for Civil Rights stated in 1991 that the current use of drugs excludes drug users from Section 504 protections:

If a drug addict is "currently" using drugs, an employer may, on that basis, choose not to employ (or may discipline or discharge a person already employed) without considering whether that person is able to perform the duties of the job or whether that person constitutes a threat to others. In other words, a current user can never be a qualified handicapped person because a current drug user can never be handicapped.¹⁰⁴

The ADA also amended Section 504 to permit school districts to take the same disciplinary action related to the use or possession of drugs or alcohol against Section 504 students who currently use illegal drugs or alcohol as they take against nondisabled students. The due process procedures that apply to students with disabilities do not apply to such disciplinary actions.¹⁰⁵

Possession alone, without current use, may not, in every case, remove Section 504 protections. For example, a student with a disability who possesses illegal drugs at school with the intent of selling them to other students would be subject to disciplinary procedures applicable to all disabled students.

CONTAGIOUS DISEASES: AIDS/HIV

Students with **Acquired Immune Deficiency Syndrome** (AIDS), AIDS-Related Complex (ARC) or otherwise infected with **Human Immunodeficiency Virus** (HIV) are individuals with disabilities under Section 504. They either qualify as actually having a physical impairment which substantially limits a major life activity or may be "regarded" as having such a disability.

In a 1990 Staff Memorandum,¹⁰⁶ OCR made the following policy conclusions about the applicability of Section 504 to students with AIDS/HIV:

- The regulatory definition of a handicapped person will be applied to children with AIDS, who are **regarded as handicapped** within the meaning of this definition.
- Children handicapped **solely by reason of AIDS** are "qualified" if they meet the age-related regulatory definition.¹⁰⁷

¹⁰⁴ OCR Staff Memorandum, 17 EHLR 609 (OCR 1991).

¹⁰⁵ 29 U.S.C. 705(20)(c)(iv).

¹⁰⁶ OCR Memorandum, 16 EHLR 712 (OCR 1990).

- Unless currently presenting a risk of contagion, a child with AIDS should **remain in the regular classroom**.
- A full evaluation is not required when neither recipients nor parents believe that a child is in need of special education or related services.
- In all other respects, school districts should apply to children with AIDS the process and procedures required by the Section 504 regulations. **Placement decisions** must be made drawing on all relevant sources mentioned in the regulation, including the latest medical information on AIDS.¹⁰⁸ The group of persons making the placement decision must include persons knowledgeable about the meaning of that information.
- All **procedural safeguards** required in Subpart D of the regulation apply to children handicapped solely by reason of AIDS.
- Children with AIDS may not be subjected to different treatment with respect to **confidentiality**.

OCR considers AIDS to be like other potentially contagious diseases or conditions, such as **tuberculosis** or **Hepatitis B**. The decision-making process regarding the placement of student with a contagious condition is outlined in court decisions referred to in the 1990 OCR memorandum. The appropriate process includes the **following three steps**:

1. Decide what an **appropriate placement** would be were it not for the contagious nature of the student's disease.
2. Decide if reasonable medical judgment and the state of medical knowledge indicate **a significant risk of contagion** by assessing the nature of the risk (how the disease is transmitted); the duration of the risk; the severity of the harm; and the probability of transmission which will cause varying degrees of harm.

¹⁰⁷ See 34 C.F.R. § 104.3(k)(2).

¹⁰⁸ See 34 C.F.R. § 104.35 (c)(3).

3. Determine if accommodations will **reduce the risk** to a medically acceptable level, bearing in mind the least restrictive environment requirement of the law.¹⁰⁹

Under Vermont law, there is **no duty to divulge** HIV/AIDS infection; nor can a student or family be required to divulge that information. Moreover, a school may not request or require a current or prospective student to have an HIV related blood test.¹¹⁰

ATTENTION DEFICIT DISORDER/ATTENTION DEFICIT HYPERACTIVITY DISORDER (ADD/ADHD)

The federal regulations issued following the 1997 reauthorization of the IDEA list ADD/ADHD as one of the "chronic or acute health problems" that might cause "limited alertness to the educational environment" for purposes of determining whether a student has an "other health impairment."¹¹¹ The comments accompanying the federal regulations explain that, regardless of the disability category chosen, a student diagnosed as having ADD/ADHD qualifies for special education services if the condition results in an adverse effect on performance in one or more of the basic skill areas and if, as a result, the student needs special education.¹¹²

In September, 1991, three federal civil rights and education agencies issued a Joint Policy Memorandum clarifying that, even if a student's ADD/ADHD did not qualify him or her for special education, it could be a recognized disability for Section 504 purposes.¹¹³ A student with ADD/ADHD would qualify for Section 504 accommodations **if it is determined that the condition substantially limits the major life activity of learning.**

An individual with ADD/ADHD is generally characterized as having difficulty staying on task, focusing attention, completing work, or engaging in age-appropriate behavior. In addition he or she may be easily distracted, produce sloppy, inconsistent work and appear to be not listening or not hearing what is being said.

The Joint Memorandum provides the following non-exclusive list of accommodations and classroom adaptations that might be useful for ADD/ADHD students.

ADAPTATIONS:

1. A structured learning environment;

¹⁰⁹ See, e.g., Martinez v. School Board, 861 F.2d 1502 (11th Cir. 1988).

¹¹⁰ 18 V.S.A. § 1127.

¹¹¹ 34 C.F.R. § 300.7(c)(9)(ii).

¹¹² 64 Fed. Reg. 12542 (1999).

¹¹³ 18 IDELR 116 (1991).

2. Repeating and simplifying instructions;
3. Supplementing verbal instructions with visual instructions;
4. Behavior management techniques;
5. Adjusting class schedules;
6. Modifying testing conditions;
7. Using of tape recorders, computers & other audio-visual equipment;
8. Selecting modified textbooks or workbooks; and
9. Tailoring homework assignments.

OTHER ACCOMMODATIONS:

1. Consultation services;
2. Using special resources like tape recorders;
3. Reducing class size;
4. One-on-one tutorials;
5. Classroom aides and note takers;
6. Involving a service coordinator; and
7. Modifying nonacademic times, such as lunch and recess.

EDUCATIONAL SUPPORT SYSTEMS UNDER VERMONT LAW AND SECTION 504

Between 1990 and 2000, the Vermont General Assembly passed three laws requiring schools to develop support systems for students who may not meet all the eligibility requirements of the IDEA, but who nevertheless show indications of needing additional support to succeed in mainstream classrooms. Act 230 of 1990 required the establishment by school districts of **Instructional Support Systems** (ESS), the primary purpose of which was to ensure "to the maximum extent possible..." that all students "succeed in the regular classroom."¹¹⁴

Act 157 of 1996 made clear that each school's ESS must include an **Educational Support Team** "comprised of staff from a variety of teaching and support services positions..." to "screen referrals to determine what classroom accommodations and remedial services have been tried..." and to "assist teachers in planning and providing services and accommodations to students in need of classroom supports."¹¹⁵

In 2000, Act 117 continued the emphasis on Educational Support Systems, requiring **annual reports** on the status of those systems in each school.¹¹⁶ The State Board regulations require

¹¹⁴ 1989 (Adj. Sess.) Vermont Laws, Act 230.

¹¹⁵ 1995 (Adj. Sess.) Vermont Laws, Act 157.

¹¹⁶ 1999 (Adj. Sess.) Vermont Laws, Act 117.

written procedures in each school for timely referrals to ESTs and, when warranted, referrals by ESTs for Section 504 evaluations.¹¹⁷

A Section 504 evaluation could be conducted by an EST rather than be referred by the EST to another entity. This could be accomplished by building into EST procedures a time for the local team to ask the question, "Does the team have reason to believe that the student has a disability within the meaning of Section 504?" If the answer is "yes," the EST could follow local Section 504 procedures to complete the Section 504 evaluation, planning and placement process. If the answer to the "disability" question is "no," the EST process should move forward, the school district having made the appropriate inquiry. If an EST **has reason to believe that a student has a disability and may be in need of special education**, a special education evaluation referral must be made.¹¹⁸

See **Appendix H** for a model school board Educational Support System policy.

QUESTIONS AND ANSWERS ON DISCIPLINING STUDENTS WHO ARE OR MAY BE QUALIFIED INDIVIDUALS WITH DISABILITIES UNDER SECTION 504

The Vermont State Board of Education has adopted a rule governing disciplinary procedures for students who are not eligible for special education but who are, or may be, qualified individuals with disabilities under Section 504.¹¹⁹ In significant ways, the procedures for disciplining Section 504 students are both similar to and distinct from the procedures used when students eligible for special education are disciplined. The following questions address the disciplinary requirements for Section 504 students.

1. How Do Section 504 Discipline Requirements Compare to Discipline Requirements Under the IDEA?

The 1997 amendments to the IDEA impose two requirements on the discipline of special education students that do not apply to Section 504 students who are subjected to disciplinary action:

- a. **Functional behavioral assessments and behavior intervention plans**, required by the IDEA and federal and state special education regulations are not explicitly required for a Section 504 student.¹²⁰ However, OCR has

¹¹⁷ Vermont State Board of Education Manual of Rules and Practices, §§ 2194; 2120.8.1.3.1.

¹¹⁸ *Id.*

¹¹⁹ Vermont State Board of Education Manual of Rules and Practices, Rule 4312. *See* Appendix I. In the following questions and answers, students who are or may be qualified individuals with disabilities are referred to as "Section 504 students."

¹²⁰ *See*, 20 U.S.C. § 1415(1)(B); 34 C.F.R. § 300.520(b)(1); Vermont State Board of Education Manual of Rules and

said that under some circumstances providing a FAPE to a child under Section 504 might require a "behavior management plan," the purpose of which would be to address "...repeated or serious misconduct such that modifying the child's negative behavior becomes a significant component of what actually takes place in the child's educational program..."¹²¹

- b. Students who are eligible under Section 504 may be suspended or expelled for misconduct on the same basis as nondisabled students when their misconduct is not a **manifestation of their disability**. Under these circumstances, the school district is not required to continue educational services during the period of suspension or expulsion. After 10 consecutive days of removal (or cumulative days that constitute a pattern), IDEA eligible students are entitled to continued educational services during periods of suspension or expulsion.¹²²

2. Does the "10 Day Rule" Applied in Special Education Cases to Determine Whether a Disciplinary Action is a Significant Change in Placement Also Apply Under Section 504?

Yes. Whenever a Section 504 student is suspended for more than 10 consecutive days, or more than 10 cumulative days in a school year that constitute a pattern, it is a significant change in placement.¹²³ In this respect, Section 504 and the IDEA are considered to be identical.

3. When is a "Suspension" Considered to be a "Significant Change in Placement?"

A "suspension" is a removal from a child's current educational placement to a setting where the child is no longer able to benefit from the accommodations provided under his or her Section 504 plan and make reasonable progress in the general curriculum. An "in school suspension" may or may not be a change in placement. It most likely will be considered a significant change in placement when the setting of the suspension deprives a child of access to the general curriculum, or does not allow

Practices, Rule 4313.4.

¹²¹ See, e.g., Elk Grove (CA) Unified School District, 25 IDELR 759 (OCR 1997).

¹²² 20 U.S.C. § 1412(a)(1); 34 C.F.R. § 330.521(d); VSBE Rule 2360.2(d).

¹²³ Whether a series of suspensions that are each 10 days or fewer but that cumulatively exceed 10 days in a school year will constitute a "pattern" sufficient to be a change in placement will depend on the length of each suspension, the proximity of the suspensions to one another and the reasons for the removals. See Vermont State Board of Education Rule 4312(6).

participation with peers in nonacademic settings, such as the school lunchroom. It is important to note that a suspension for part of a day counts toward the 10-day limit.

4. May a Section 504 Student Be Suspended for 10 Days or Fewer In a School Year if His or Her Misconduct is a Manifestation of His or Her Disability?

Yes. As in the case of a student eligible for special education, a student who is being served through a Section 504 plan may be disciplined on the same basis as nondisabled students without regard to the relationship of his or her disability to the conduct in question. If students who are not disabled are subjected to suspensions for particular violations of school rules, disabled students may also be suspended for the same violations for up to 10 days in a school year.

5. Under What Circumstances May a Section 504 Student Be Suspended for More than 10 Days in a School Year?

A student who is eligible for Section 504 services may be suspended for more than 10 consecutive or cumulative days in a school year when the misconduct for which the suspension is imposed is not a result (or a "manifestation") of his or her disability.¹²⁴ The manifestation determination may not be made until a re-evaluation is completed.¹²⁵

6. How is a Manifestation Determination Made Under Section 504?

A child's Section 504 team must determine whether specific misconduct is caused by the child's disability. The team applies the same criteria to make this "manifestation determination" as would be applied in the case of a student eligible for special education. OCR has outlined the process that it expects to find if it is asked to investigate a complaint related to student discipline.

- *"The group (making the determination) must be knowledgeable about the student and the meaning of evaluation data."*

¹²⁴ VSBE Rule 4312(3).

¹²⁵ VSBE Rule 4312(1) & (2). The same restriction applies to disciplinary removals of students who have not been found eligible for Section 504 services but are "believed to be qualified individuals with disabilities" under Section 504. See VSBE Rule 4312(5) & (6); 34 C.F.R. § 104.36. A school district will be deemed to have had knowledge that a child is a qualified individual when circumstances are present to show that a Section 504 evaluation should have been conducted prior to the student's misconduct. See, e.g., VSBE Rule 4313.14.

- *The group must also have available to it information that competent professionals would require, such as psychological evaluation data related to behavior.*
- *The relevant information must be recent enough to afford an understanding of the student's current behavior."¹²⁶*

In reviewing the relevant data, the team must determine whether the student's misconduct was caused by his or her disability. If it was, the conduct will be considered a manifestation of the disability.

7. What Are the Consequences of A Determination that Misconduct is a Manifestation of a Student's Disability?

If it is determined that the misconduct is caused by the disability, the Section 504 team must consider alterations to the child's Section 504 plan, and may change the student's educational placement if a change is found by the team to be appropriate. The team may also consider the implementation and enforcement of a behavior management plan as part of the student's overall Section 504 plan. If the determination is that the misconduct is not caused by the student's disability, the student may be disciplined in the same manner as any other student.

8. To What Extent Do the Interim Alternative Placements Created by the 1997 IDEA Reauthorization Apply to Section 504 Students?

Although the federal Section 504 regulations do not answer this question, the Vermont State Board of Education Rules do. Interim alternative placements may be ordered by school officials for a Section 504 student when the student possesses weapons at school or at school functions. In this case, the Vermont rule is explicitly intended to operate in the same manner for Section 504 students as for special education students.¹²⁷ In addition, when a Section 504 student is shown to pose a substantial threat of injury to him or herself or to others, a hearing officer may order an interim alternative placement meeting certain substantive standards for up to 45 days.¹²⁸

9. What Recourse Do Parents Have When They Disagree With a Disciplinary Action Affecting Their Child?

¹²⁶ See, e.g., Bryon County (GA) Sch. Dist., 20 IDELR 930 (OCR 1993).

¹²⁷ VSBE Rule 4312(7).

¹²⁸ VSBE Rule 4312(9).

The State Board rule governing discipline procedures for Section 504 students provides for due process hearings to resolve disagreements between parents and school districts over discipline. Parents may also seek redress through the OCR complaint process.¹²⁹

10. What if a Section 504 Student Possesses Drugs or Alcohol at School Functions?

Possession of illegal drugs or alcohol at school functions may remove an otherwise eligible student from the disciplinary protections of Section 504. This will be true if the student is being disciplined on the same basis as students without disabilities for violating school rules against drugs and alcohol, and the student is a current user of illegal drugs or alcohol.¹³⁰

¹²⁹ VSBE Rule 4312(8).

¹³⁰ See "Students Addicted to or Currently Using Illegal Drugs or Alcohol..." *infra*.

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SECTION 504 REGULATIONS
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TITLE 34 EDUCATION

SUBTITLE B REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF
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CHAPTER I -- OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION

**PART 104 -- NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS
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AUTHORITY: 20 U.S.C. 1405; 29 U.S.C. 794.

SOURCE: 45 FR 30936, May 9, 1980, unless otherwise noted.

Subpart A -- General Provisions

§ 104.1 Purpose.

The purpose of this part is to effectuate section 504 of the Rehabilitation Act of 1973, which is designed to eliminate discrimination on the basis of handicap in any program or activity receiving Federal financial assistance.

§ 104.2 Application.

This part applies to each recipient of Federal financial assistance from the Department of Education and to the program or activity that receives such assistance.

§ 104.3 Definitions.

As used in this part, the term:

- (a) *The Act* means the Rehabilitation Act of 1973, Pub. L. 93-112, as amended by the Rehabilitation Act Amendments of 1974, Pub. L. 93-516, 29 U.S.C. 794.
- (b) *Section 504* means section 504 of the Act.
- (c) *Education of the Handicapped Act* means that statute as amended by the Education for all Handicapped Children Act of 1975, Pub. L. 94-142, 20 U.S.C. 1401 et seq.
- (d) *Department* means the Department of Education.
- (e) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department of Education.
- (f) *Recipient* means any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee of a recipient, but excluding the ultimate beneficiary of the assistance.

(g) *Applicant for assistance* means one who submits an application, request, or plan required to be approved by a Department official or by a recipient as a condition to becoming a recipient.

(h) *Federal financial assistance* means any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of Federal personnel; or

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal Government.

(i) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property.

(j) *Handicapped person* -- (1) *Handicapped persons* means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) *Physical or mental impairment* means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) *Is regarded as having an impairment* means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

(k) *Program or activity* means all of the operations of--

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship--

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (k)(1), (2), or (3) of this section; any part of which is extended Federal financial assistance.

(Authority: 29 U.S.C. 794(b))

(l) *Qualified handicapped person* means:

(1) With respect to employment, a handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) With respect to public preschool elementary, secondary, or adult educational services, a handicapped person (i) of an age during which nonhandicapped persons are provided such services, (ii) of any age during which it is mandatory under state law to provide such services to handicapped persons, or (iii) to whom a state is required to provide a free appropriate public education under section 612 of the Education of the Handicapped Act; and

(3) With respect to postsecondary and vocational education services, a handicapped person who meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity;

(4) With respect to other services, a handicapped person who meets the essential eligibility requirements for the receipt of such services.

(m) *Handicap* means any condition or characteristic that renders a person a handicapped person as defined in paragraph (j) of this section.

§ 104.4 Discrimination prohibited.

(a) *General.* No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity which receives Federal financial assistance.

(b) *Discriminatory actions prohibited.* (1) A recipient, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that provided to others;

(iv) Provide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are as effective as those provided to others;

(v) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity;

(vi) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(vii) Otherwise limit a qualified handicapped person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit, or service.

(2) For purposes of this part, aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs.

(3) Despite the existence of separate or different aid, benefits, or services provided in accordance with this part, a recipient may not deny a qualified handicapped person the opportunity to participate in such aid, benefits, or services that are not separate or different.

(4) A recipient may not, directly or through contractual or other arrangements, utilize criteria or methods of administration (i) that have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap, (ii) that have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the recipient's program or activity with respect to handicapped persons, or (iii) that perpetuate the discrimination of another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(5) In determining the site or location of a facility, an applicant for assistance or a recipient may not make selections (i) that have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives Federal financial assistance or (ii) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity with respect to handicapped persons.

(6) As used in this section, the aid, benefit, or service provided under a program or activity receiving Federal financial assistance includes any aid, benefit, or service provided in or through a facility that has been constructed, expanded, altered, leased or rented, or otherwise acquired, in whole or in part, with Federal financial assistance.

(c) *Aid, benefits or services limited by Federal law.* The exclusion of nonhandicapped persons from aid, benefits, or services limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aid, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.

§ 104.5 Assurances required.

(a) *Assurances.* An applicant for Federal financial assistance to which this part applies shall submit an assurance, on a form specified by the Assistant Secretary, that the program or activity will be operated in compliance with this part. An applicant may incorporate these assurances by reference in subsequent applications to the Department.

(b) *Duration of obligation.* (1) In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient or, in the case of a subsequent transfer, the transferee, for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) In the case of Federal financial assistance extended to provide personal property, the assurance will obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases the assurance will obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Covenants.* (1) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the instrument effecting or recording this transfer

shall contain a covenant running with the land to assure nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

(2) Where no transfer of property is involved but property is purchased or improved with Federal financial assistance, the recipient shall agree to include the covenant described in paragraph (b)(2) of this section in the instrument effecting or recording any subsequent transfer of the property.

(3) Where Federal financial assistance is provided in the form of real property or interest in the property from the Department, the covenant shall also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant. If a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing, facilities on the property for the purposes for which the property was transferred, the Assistant Secretary may, upon request of the transferee and if necessary to accomplish such financing and upon such conditions as he or she deems appropriate, agree to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective.

104.6 Remedial action, voluntary action, and self-evaluation.

(a) *Remedial action.* (1) If the Assistant Secretary finds that a recipient has discriminated against persons on the basis of handicap in violation of section 504 or this part, the recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of the discrimination.

(2) Where a recipient is found to have discriminated against persons on the basis of handicap in violation of section 504 or this part and where another recipient exercises control over the recipient that has discriminated, the Assistant Secretary, where appropriate, may require either or both recipients to take remedial action.

(3) The Assistant Secretary may, where necessary to overcome the effects of discrimination in violation of section 504 or this part, require a recipient to take remedial action (i) with respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred or (ii) with respect to handicapped persons who would have been participants in the program or activity had the discrimination not occurred.

(b) *Voluntary action.* A recipient may take steps, in addition to any action that is required by this part, to overcome the effects of conditions that resulted in limited participation in the recipient's program or activity by qualified handicapped persons.

(c) *Self-evaluation.* (1) A recipient shall, within one year of the effective date of this part:

(i) Evaluate, with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons, its current policies and practices and the effects thereof that do not or may not meet the requirements of this part;

(ii) Modify, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, any policies and practices that do not meet the requirements of this part; and

(iii) Take, after consultation with interested persons, including handicapped persons or organizations representing handicapped persons, appropriate remedial steps to eliminate the effects of any discrimination that resulted from adherence to these policies and practices.

(2) A recipient that employs fifteen or more persons shall, for at least three years following completion of the evaluation required under paragraph (c)(1) of this section, maintain on file, make available for public inspection, and provide to the Assistant Secretary upon request:

(i) A list of the interested persons consulted,

(ii) A description of areas examined and any problems identified, and

(iii) A description of any modifications made and of any remedial steps taken.

§ 104.7 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* A recipient that employs fifteen or more persons shall designate at least one person to coordinate its efforts to comply with this part.

(b) *Adoption of grievance procedures.* A recipient that employs fifteen or more persons shall adopt grievance procedures that incorporate appropriate due process standards and that provide for the prompt and equitable resolution of complaints alleging any action prohibited by this part. Such procedures need not be established with respect to complaints from applicants for employment or from applicants for admission to postsecondary educational institutions.

§ 104.8 Notice.

(a) A recipient that employs fifteen or more persons shall take appropriate initial and continuing steps to notify participants, beneficiaries, applicants, and employees, including those with impaired vision or hearing, and unions or professional organizations holding collective bargaining or professional agreements with the recipient that it does not discriminate on the basis of handicap in violation of section 504 and this part. The notification shall state, where appropriate, that the recipient does not discriminate in admission or access to, or treatment or employment in, its program or activity. The notification shall also include an identification of the responsible employee designated pursuant to 104.7(a). A recipient shall make the initial notification required by this paragraph within 90 days of the effective date of this part. Methods of initial and continuing notification may include the posting of notices, publication in newspapers and magazines, placement of notices in recipients' publication, and distribution of memoranda or other written communications.

(b) If a recipient publishes or uses recruitment materials or publications containing general information that it makes available to participants, beneficiaries, applicants, or employees, it shall include in those materials or publications a statement of the policy described in paragraph (a) of this section. A recipient may meet the requirement of this paragraph either by including

appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

§ 104.9 Administrative requirements for small recipients.

The Assistant Secretary may require any recipient with fewer than fifteen employees, or any class of such recipients, to comply with 104.7 and 104.8, in whole or in part, when the Assistant Secretary finds a violation of this part or finds that such compliance will not significantly impair the ability of the recipient or class of recipients to provide benefits or services.

§ 104.10 Effect of state or local law or other requirements and effect of employment opportunities.

(a) The obligation to comply with this part is not obviated or alleviated by the existence of any state or local law or other requirement that, on the basis of handicap, imposes prohibitions or limits upon the eligibility of qualified handicapped persons to receive services or to practice any occupation or profession.

(b) The obligation to comply with this part is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for handicapped persons than for nonhandicapped persons.

Subpart B -- Employment Practices

§ 104.11 Discrimination prohibited.

(a) *General.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity to which this part applies.

(2) A recipient that receives assistance under the Education of the Handicapped Act shall take positive steps to employ and advance in employment qualified handicapped persons in programs or activities assisted under that Act.

(3) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(4) A recipient may not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeships.

(b) *Specific activities.* The provisions of this subpart apply to:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absense, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including those that are social or recreational; and

(9) Any other term, condition, or privilege of employment.

(c) A recipient's obligation to comply with this subpart is not affected by any inconsistent term of any collective bargaining agreement to which it is a party.

§ 104.12 Reasonable accommodation.

(a) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program or activity.

(b) Reasonable accommodation may include:

(1) Making facilities used by employees readily accessible to and usable by handicapped persons, and

(2) Job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of readers or interpreters, and other similar actions.

(c) In determining pursuant to paragraph (a) of this section whether an accommodation would impose an undue hardship on the operation of a recipient's program or activity, factors to be considered include:

(1) The overall size of the recipient's program or activity with respect to number of employees, number and type of facilities, and size of budget;

(2) The type of the recipient's operation, including the composition and structure of the recipient's workforce; and

(3) The nature and cost of the accommodation needed.

(d) A recipient may not deny any employment opportunity to a qualified handicapped employee or applicant if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 104.13 Employment criteria.

(a) A recipient may not make use of any employment test or other selection criterion that screens out or tends to screen out handicapped persons or any class of handicapped persons unless:

(1) The test score or other selection criterion, as used by the recipient, is shown to be job-related for the position in question, and

(2) Alternative job-related tests or criteria that do not screen out or tend to screen out as many handicapped persons are not shown by the Director to be available.

(b) A recipient shall select and administer tests concerning employment so as best to ensure that, when administered to an applicant or employee who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's or employee's job skills, aptitude, or whatever other factor the test purports to measure, rather than reflecting the applicant's or employee's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

§ 104.14 Preemployment inquiries.

(a) Except as provided in paragraphs (b) and (c) of this section, a recipient may not conduct a preemployment medical examination or may not make preemployment inquiry of an applicant as to whether the applicant is a handicapped person or as to the nature or severity of a handicap. A recipient may, however, make preemployment inquiry into an applicant's ability to perform job-related functions.

(b) When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6 (a), when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), or when a recipient is taking affirmative action pursuant to section 503 of the Act, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped, *Provided, That*:

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary or affirmative action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (d) of this section, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with this part.

(c) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, *Provided, That:*

(1) All entering employees are subjected to such an examination regardless of handicap, and

(2) The results of such an examination are used only in accordance with the requirements of this part.

(d) Information obtained in accordance with this section as to the medical condition or history of the applicant shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(1) Supervisors and managers may be informed regarding restrictions on the work or duties of handicapped persons and regarding necessary accommodations;

(2) First aid and safety personnel may be informed, where appropriate, if the condition might require emergency treatment; and

(3) Government officials investigating compliance with the Act shall be provided relevant information upon request.

Subpart C--Accessibility

§ 104.21 Discrimination prohibited.

No qualified handicapped person shall, because a recipient's facilities are inaccessible to or unusable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity to which this part applies.

§ 104.22 Existing facilities.

(a) *Accessibility.* A recipient shall operate its program or activity so that when each part is viewed in its entirety, it is readily accessible to handicapped persons. This paragraph does not require a recipient to make each of its existing facilities or every part of a facility accessible to and usable by handicapped persons.

(b) *Methods.* A recipient may comply with the requirements of paragraph (a) of this section through such means as redesign of equipment, reassignment of classes or other services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of health, welfare, or other social services at alternate accessible sites, alteration of existing facilities and construction of new facilities in conformance with the requirements of 104.23, or any other methods that result in making its program or activity accessible to handicapped persons. A recipient is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with paragraph (a) of this section. In choosing among available methods for meeting the requirement of paragraph (a) of this section, a recipient shall give priority to those methods that serve handicapped persons in the most integrated setting appropriate.

(c) *Small health, welfare, or other social service providers.* If a recipient with fewer than fifteen employees that provides health, welfare, or other social services finds, after consultation with a handicapped person seeking its services, that there is no method of complying with paragraph (a) of this section other than making a significant alteration in its existing facilities, the recipient may, as an alternative, refer the handicapped person to other providers of those services that are accessible.

(d) *Time period.* A recipient shall comply with the requirement of paragraph (a) of this section within sixty days of the effective date of this part except that where structural changes in facilities are necessary, such changes shall be made within three years of the effective date of this part, but in any event as expeditiously as possible.

(e) *Transition plan.* In the event that structural changes to facilities are necessary to meet the requirement of paragraph (a) of this section, a recipient shall develop, within six months of the effective date of this part, a transition plan setting forth the steps necessary to complete such changes. The plan shall be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum:

(1) Identify physical obstacles in the recipient's facilities that limit the accessibility of its program or activity to handicapped persons;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve full accessibility in order to comply with paragraph (a) of this section and, if the time period of the transition plan is longer than one year, identify the steps of that will be taken during each year of the transition period; and

(4) Indicate the person responsible for implementation of the plan.

(f) *Notice.* The recipient shall adopt and implement procedures to ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of services, activities, and facilities that are accessible to and usable by handicapped persons.

§ 104.23 New construction.

(a) *Design and construction.* Each facility or part of a facility constructed by, on behalf of, or for the use of a recipient shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by handicapped persons, if the construction was commenced after the effective date of this part.

(b) *Alteration.* Each facility or part of a facility which is altered by, on behalf of, or for the use of a recipient after the effective date of this part in a manner that affects or could affect the usability of the facility or part of the facility shall, to the maximum extent feasible, be altered in such manner that the altered portion of the facility is readily accessible to and usable by handicapped persons.

(c) *Conformance with Uniform Federal Accessibility Standards.* (1) Effective as of January 18, 1991, design, construction, or alteration of buildings in conformance with sections 3-8 of the Uniform Federal Accessibility Standards (UFAS) (Appendix A to 41 CFR subpart 101-19.6) shall be deemed to comply with the requirements of this section with respect to those buildings. Departures from particular technical and scoping requirements of UFAS by the use of other methods are permitted where substantially equivalent or greater access to and usability of the building is provided.

(2) For purposes of this section, section 4.1.6(1)(g) of UFAS shall be interpreted to exempt from the requirements of UFAS only mechanical rooms and other spaces that, because of their intended use, will not require accessibility to the public or beneficiaries or result in the employment or residence therein of persons with physical handicaps.

(3) This section does not require recipients to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member.

[45 FR 30936, May 9, 1980; 45 FR 37426, June 3, 1980, as amended at 55 FR 52138, 52141, Dec. 19, 1990]

Subpart D -- Preschool, Elementary, and Secondary Education

§ 104.31 Application of this subpart.

Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§ 104.32 Location and notification.

A recipient that operates a public elementary or secondary education program or activity shall annually:

- (a) Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
- (b) Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

§ 104.33 Free appropriate public education.

(a) *General.* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) *Appropriate education.* (1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

(3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

(c) *Free education -- (1) General.* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.

(2) *Transportation.* If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.

(3) *Residential placement.* If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.

(4) *Placement of handicapped persons by parents.* If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of 104.36.

(d) *Compliance.* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

§ 104.34 Educational setting.

(a) *Academic setting.* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

(b) *Nonacademic settings.* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.

(c) *Comparable facilities.* If a recipient, in compliance with paragraph (a) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

§ 104.35 Evaluation and placement.

(a) *Preplacement evaluation.* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (b) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.

(b) *Evaluation procedures.* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:

(1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;

(2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and

(3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

(c) *Placement procedures.* In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the placement decision is made in conformity with 104.34.

(d) *Reevaluation.* A recipient to which this section applies shall establish procedures, in accordance with paragraph (b) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

§ 104.36 Procedural safeguards.

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

§ 104.37 Nonacademic services.

(a) *General.* (1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

(2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

(b) *Counseling services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities.

(c) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to nonhandicapped students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

§ 104.38 Preschool and adult education.

A recipient to which this subpart applies that provides preschool education or day care or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided.

§ 104.39 Private education.

(a) A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in 104.33(b)(1), within that recipient's program or activity.

(b) A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to nonhandicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.

(c) A recipient to which this section applies that provides special education shall do so in accordance with the provisions of 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of 104.34, 104.37, and 104.38.

Subpart E -- Postsecondary Education

§ 104.41 Application of this subpart.

Subpart E applies to postsecondary education programs or activities, including postsecondary vocational education programs or activities, that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§ 104.42 Admissions and recruitment.

(a) *General.* Qualified handicapped persons may not, on the basis of handicap, be denied admission or be subjected to discrimination in admission or recruitment by a recipient to which this subpart applies.

(b) *Admissions.* In administering its admission policies, a recipient to which this subpart applies:

(1) May not apply limitations upon the number or proportion of handicapped persons who may be admitted;

(2) May not make use of any test or criterion for admission that has a disproportionate, adverse effect on handicapped persons or any class of handicapped persons unless (i) the test or criterion, as used by the recipient, has been validated as a predictor of success in the education program or activity in question and (ii) alternate tests or criteria that have a less disproportionate, adverse effect are not shown by the Assistant Secretary to be available.

(3) Shall assure itself that (i) admissions tests are selected and administered so as best to ensure that, when a test is administered to an applicant who has a handicap that impairs sensory, manual, or speaking skills, the test results accurately reflect the applicant's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the applicant's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure); (ii) admissions tests that are designed for persons with impaired sensory, manual, or speaking skills are offered as often and in as timely a manner as are other admissions tests; and (iii) admissions tests are administered in facilities that, on the whole, are accessible to handicapped persons; and

(4) Except as provided in paragraph (c) of this section, may not make preadmission inquiry as to whether an applicant for admission is a handicapped person but, after admission, may make inquiries on a confidential basis as to handicaps that may require accommodation.

(c) *Preadmission inquiry exception.* When a recipient is taking remedial action to correct the effects of past discrimination pursuant to 104.6(a) or when a recipient is taking voluntary action to overcome the effects of conditions that resulted in limited participation in its federally assisted program or activity pursuant to 104.6(b), the recipient may invite applicants for admission to indicate whether and to what extent they are handicapped, *Provided, That:*

(1) The recipient states clearly on any written questionnaire used for this purpose or makes clear orally if no written questionnaire is used that the information requested is intended for use solely in connection with its remedial action obligations or its voluntary action efforts; and

(2) The recipient states clearly that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will be used only in accordance with this part.

(d) *Validity studies.* For the purpose of paragraph (b)(2) of this section, a recipient may base prediction equations on first year grades, but shall conduct periodic validity studies against the criterion of overall success in the education program or activity in question in order to monitor the general validity of the test scores.

§ 104.43 Treatment of students; general.

(a) No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular, or other postsecondary education aid, benefits, or services to which this subpart applies.

(b) A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, and

education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provides an equal opportunity for the participation of qualified handicapped persons.

(c) A recipient to which this subpart applies may not, on the basis of handicap, exclude any qualified handicapped student from any course, course of study, or other part of its education program or activity.

(d) A recipient to which this subpart applies shall operate its program or activity in the most integrated setting appropriate.

§ 104.44 Academic adjustments.

(a) *Academic requirements.* A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section. Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

(b) *Other rules.* A recipient to which this subpart applies may not impose upon handicapped students other rules, such as the prohibition of tape recorders in classrooms or of dog guides in campus buildings, that have the effect of limiting the participation of handicapped students in the recipient's education program or activity.

(c) *Course examinations.* In its course examinations or other procedures for evaluating students' academic achievement, a recipient to which this subpart applies shall provide such methods for evaluating the achievement of students who have a handicap that impairs sensory, manual, or speaking skills as will best ensure that the results of the evaluation represents the student's achievement in the course, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where such skills are the factors that the test purports to measure).

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies shall take such steps as are necessary to ensure that no handicapped student is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills.

(2) Auxiliary aids may include taped texts, interpreters or other effective methods of making orally delivered materials available to students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and actions. Recipients need not provide attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature.

§ 104.45 Housing.

(a) *Housing provided by the recipient.* A recipient that provides housing to its nonhandicapped students shall provide comparable, convenient, and accessible housing to handicapped students at the same cost as to others. At the end of the transition period provided for in subpart C, such housing shall be available in sufficient quantity and variety so that the scope of handicapped students' choice of living accommodations is, as a whole, comparable to that of nonhandicapped students.

(b) *Other housing.* A recipient that assists any agency, organization, or person in making housing available to any of its students shall take such action as may be necessary to assure itself that such housing is, as a whole, made available in a manner that does not result in discrimination on the basis of handicap.

§ 104.46 Financial and employment assistance to students.

(a) *Provision of financial assistance.* (1) In providing financial assistance to qualified handicapped persons, a recipient to which this subpart applies may not,

(i) On the basis of handicap, provide less assistance than is provided to nonhandicapped persons, limit eligibility for assistance, or otherwise discriminate or

(ii) Assist any entity or person that provides assistance to any of the recipient's students in a manner that discriminates against qualified handicapped persons on the basis of handicap.

(2) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established under wills, trusts, bequests, or similar legal instruments that require awards to be made on the basis of factors that discriminate or have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

(b) *Assistance in making available outside employment.* A recipient that assists any agency, organization, or person in providing employment opportunities to any of its students shall assure itself that such employment opportunities, as a whole, are made available in a manner that would not violate subpart B if they were provided by the recipient.

(c) *Employment of students by recipients.* A recipient that employs any of its students may not do so in a manner that violates subpart B.

§ 104.47 Nonacademic services.

(a) *Physical education and athletics.* (1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors intercollegiate, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation in these activities.

(2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different only if separation or differentiation is consistent with the requirements of 104.43(d) and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

(b) *Counseling and placement services.* A recipient to which this subpart applies that provides personal, academic, or vocational counseling, guidance, or placement services to its students shall provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are nonhandicapped students with similar interests and abilities. This requirement does not preclude a recipient from providing factual information about licensing and certification requirements that may present obstacles to handicapped persons in their pursuit of particular careers.

(c) *Social organizations.* A recipient that provides significant assistance to fraternities, sororities, or similar organizations shall assure itself that the membership practices of such organizations do not permit discrimination otherwise prohibited by this subpart.

Subpart F -- Health, Welfare, and Social Services

§ 104.51 Application of this subpart.

Subpart F applies to health, welfare, and other social service programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

§ 104.52 Health, welfare, and other social services.

(a) *General.* In providing health, welfare, or other social services or benefits, a recipient may not, on the basis of handicap:

- (1) Deny a qualified handicapped person these benefits or services;
- (2) Afford a qualified handicapped person an opportunity to receive benefits or services that is not equal to that offered nonhandicapped persons;
- (3) Provide a qualified handicapped person with benefits or services that are not as effective (as defined in 104.4(b)) as the benefits or services provided to others;
- (4) Provide benefits or services in a manner that limits or has the effect of limiting the participation of qualified handicapped persons; or
- (5) Provide different or separate benefits or services to handicapped persons except where necessary to provide qualified handicapped persons with benefits and services that are as effective as those provided to others.

(b) *Notice.* A recipient that provides notice concerning benefits or services or written material concerning waivers of rights or consent to treatment shall take such steps as are necessary to

ensure that qualified handicapped persons, including those with impaired sensory or speaking skills, are not denied effective notice because of their handicap.

(c) *Emergency treatment for the hearing impaired.* A recipient hospital that provides health services or benefits shall establish a procedure for effective communication with persons with impaired hearing for the purpose of providing emergency health care.

(d) *Auxiliary aids.* (1) A recipient to which this subpart applies that employs fifteen or more persons shall provide appropriate auxiliary aids to persons with impaired sensory, manual, or speaking skills, where necessary to afford such persons an equal opportunity to benefit from the service in question.

(2) The Assistant Secretary may require recipients with fewer than fifteen employees to provide auxiliary aids where the provision of aids would not significantly impair the ability of the recipient to provide its benefits or services.

(3) For the purpose of this paragraph, auxiliary aids may include brailled and taped material, interpreters, and other aids for persons with impaired hearing or vision.

§ 104.53 Drug and alcohol addicts.

A recipient to which this subpart applies that operates a general hospital or outpatient facility may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism.

§ 104.54 Education of institutionalized persons.

A recipient to which this subpart applies and that operates or supervises a program or activity that provides aid, benefits or services for persons who are institutionalized because of handicap shall ensure that each qualified handicapped person, as defined in 104.3(k)(2), in its program or activity is provided an appropriate education, as defined in 104.33(b). Nothing in this section shall be interpreted as altering in any way the obligations of recipients under subpart D.

Subpart G -- Procedures

§ 104.61 Procedures.

The procedural provisions applicable to title VI of the Civil Rights Act of 1964 apply to this part. These procedures are found in 100.6-100.10 and part 101 of this title.

**OCR GUIDANCE ON NOTICE OF
NONDISCRIMINATION
(Appendix B)**

NOTICE OF NON-DISCRIMINATION

U.S. Department of Education
Office for Civil Rights
Washington, D.C. 20202-1100
January 1999

Introduction

The Department of Education's (ED) Office for Civil Rights (OCR) enforces several statutes that protect the rights of beneficiaries in programs or activities that receive financial assistance from ED. These laws prohibit discrimination on the basis of race, color, and national origin (Title VI of the Civil Rights Act of 1964), sex (Title IX of the Education Amendments of 1972), disability (Section 504 of the Rehabilitation Act of 1973), and age (Age Discrimination Act of 1975). OCR also has responsibilities under Title II of the Americans with Disabilities Act, which prohibits state and local governments from discriminating on the grounds of disability.

This fact sheet explains the requirements for schools, colleges, state and local governments that receive federal funds to issue notices of non-discrimination, clarifies the information that they should include in their non-discrimination notices, and provides a sample notice of non-discrimination. This fact sheet is designed to assist education institutions in establishing a notice of non-discrimination that meets the requirements of the applicable regulations.

Notice of Non-discrimination Requirements

The regulations implementing Title VI, Title IX, Section 504, and the Age Discrimination Act contain requirements for recipients to issue notices of non-discrimination. (See 34 C.F.R. Sections 100.6(d), 106.9, 104.8, and 110.25, respectively.) The Title II regulation also contains a notice requirement that applies to all units of government, whether or not they receive federal aid. (See 28 C.F.R. Section 35.106.)

These regulations require that recipients notify students, parents and others that they do not discriminate on the basis of race, color, national origin, sex, disability, and age. However, these regulations contain minor differences relating to the required content of recipient notices of non-discrimination and the methods used to publish them.

The Title VI regulation requires schools and colleges to notify students and others of the regulatory provisions in a manner that a responsible ED official would find necessary to tell students of their protections against discrimination under the statute and regulation.

The Title IX and the Section 504 regulations both contain more detailed requirements that specify the information that must be included in a notice of non-discrimination. These regulations also require recipients to designate at least one employee to coordinate efforts to comply with and carry out responsibilities.

The Title IX regulation requires schools and colleges to implement specific and continuing steps to inform students and others of the protections against discrimination on the basis of sex. The notification must state that the requirement of non-discrimination in educational programs and activities extends to employment and admission. It also must say that questions about Title IX

may be referred to the employee designated to coordinate Title IX compliance or to the Assistant Secretary for Civil Rights. Schools are required to include the name, address, and telephone number of the designated coordinator in their notifications.

The Section 504 regulation requires that a school employing 15 or more persons must implement appropriate, continuing steps to notify students and others that the school does not discriminate on the basis of disability in violation of the statute and regulation. The notification must state, where appropriate, that the education institution does not discriminate in admission, treatment, or access to its programs or activities. The notification also must state that the institution does not discriminate in employment in its programs or activities. The employee designated to coordinate compliance with Section 504 regulations must be identified in the notification.

The Title II regulation requires that a public entity generally make information regarding the provisions of Title II available to applicants, participants and other interested persons.

The regulation implementing the Age Discrimination Act requires a school or college to notify its students and applicants of information regarding the provisions of the Act and the regulations applicability to specific programs. The notice must identify the compliance coordinator by name or title, address, and telephone number.

Methods of Notification

In accordance with the Title IX and Section 504 regulations, notification may include posting information notices, publishing in local newspapers, and publishing in newspapers and magazines operated by the school or its students, publishing in alumnae or alumni newspapers or magazines, or distributing memoranda or other written communications to students and employees. In addition, recipients are required to include a statement of nondiscriminatory policy in any bulletins, announcements, publications, catalogs, application forms, or other recruitment materials that are made available to participants, students, applicants, or employees. As noted in the pertinent Section 504 regulation, schools may meet this requirement either by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

Neither the Title VI regulation, the Age Discrimination Act regulation, nor the Title II regulation specifies the methods to be used by recipients in publishing notices of non-discrimination.

Combined Requirements

OCR recognizes the variations among the regulations governing notice requirements and understands that schools and colleges may wish to use one statement to comply with all requirements of the regulations implementing Title VI, Title IX, Section 504, and the Age Discrimination Act. Public institutions also may wish to include Title II of the ADA in their statement. OCR encourages one combined notice for the regulations.

A combined non-discrimination notice should contain two basic elements: (1) a statement of non-discrimination that specifies the basis for non-discrimination; and (2) identification by name or title, address, and telephone number of the employee or employees responsible for coordinating the compliance efforts.

The regulations do not require that a recipient identify the pertinent regulations by title. Please see the sample notice below.

The Title IX regulation requires a recipient to provide the name of the person responsible for its compliance effort in addition to the address and telephone number where that person may be contacted. However, because OCR recognizes that the inclusion of a person's name in a non-discrimination notice may result in an overly burdensome requirement to republish the notice if a person leaves the coordinator position, it is acceptable for a recipient to identify its coordinator only through a position title.

The Section 504 regulation does not require a recipient to include the address or telephone number of the responsible employee assigned to coordinate its compliance efforts. However, OCR considers that identifying the responsible employee without information on how to contact that person does not constitute an effective notice. An acceptable non-discrimination notice should provide information on how to contact the responsible employee.

Compliance with the notification requirements of Section 504 will also generally satisfy the notification requirements of Title II for state and local governments.

Although the Section 504 and Title IX regulations state that schools and colleges, where appropriate, shall specify non-discrimination in the areas of admission and employment, a general statement indicating non-discrimination in all programs is acceptable.

The Title IX regulation indicates that inquiries concerning the application of the Title IX regulations may be referred to the coordinator or to the Assistant Secretary for Civil Rights. An acceptable notice may include the names and titles of either one or both individuals. If a recipient designates two different people to coordinate compliance with Section 504 and Title IX, both names or titles should be included in the notice.

Sample Notice of Non-discrimination

The following sample notice of non-discrimination meets the minimum requirements of the regulations enforced by OCR:

The (Name of Recipient) does not discriminate on the basis of race, color, national origin, sex, disability, or age in its programs and activities. The following person has been designated to handle inquiries regarding the non-discrimination policies:

Name and/or Title
Address
Telephone No.

Name and/or Title
Address
Telephone No.

For further information on notice of non-discrimination, see list of OCR enforcement offices for the address and phone number of the office that serves your area, or call 1-(800)-421-3481

* For use when more than one official has been designated to coordinate civil rights compliance.

**VERMONT SCHOOL BOARDS ASSOCIATION
POLICY ON
NONDISCRIMINATION
(Appendix C)**

VSBA 2001 Vermont Model Policy Manual

CODE C6

BOARD COMMITMENT TO NON-DISCRIMINATION

Policy

The Board will not unlawfully discriminate against any person or group on the basis of race, color, religion (creed), ancestry, national origin, place of birth, sex, sexual orientation, disability, age, or marital status

Notice of Non-Discrimination

Applicants for admission and employment, students, parents, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the _____ School District are hereby notified that this District does not discriminate on the basis of race, color, religion (creed), ancestry, national origin, place of birth, sex, sexual orientation, disability, age, or marital status in admission or access to, or treatment or employment in, its programs and activities.

A person has been designated by the _____ School District to coordinate the District's efforts to comply with the regulations implementing Title VI, Title IX, and Section 504 of the Rehabilitation Act of 1973, and other non-discrimination laws or regulations. The designated coordinator is identified in the procedure accompanying this policy along with information on how that person may be contacted.

Any person having inquiries concerning the _____ School District's compliance with the regulations implementing Title VI, Title IX, Section 504 or other state or federal non-discrimination laws or regulations is directed to contact the non-discrimination coordinator described above.

Grievance Procedure In the absence of a controlling grievance procedure outlined in a collective bargaining agreement the procedure accompanying this policy will be in effect.

Date Warned:

Date Adopted:

Legal Reference(s):

9 V.S.A. §4502 (*Public accommodations*)
21 V.S.A. §§495 et seq. (*Employment practices*)
21 V.S.A. §1726 (*Unfair labor practices*)
20 U.S.C. §1400 et seq. (*IDEA*)
20 U.S.C. §§1681 et seq. (*Title IX, Education Amendments of 1972*)
29 U.S.C. §206(d) (*Equal Pay Act of 1963*)
29 U.S.C. §621 et seq. (*Age Discrimination in Employment Act*)
29 U.S.C. §794 (*Section 504, Rehabilitation Act of 1973*)
42 U.S.C. §2000d et seq. (*Title VI of the Civil Rights Act of 1964*)
42 U.S.C. §12101 et seq. (*Americans with Disabilities Act of 1990*)

Cross Reference:

Personnel: Recruitment, Selection, Appointment and Criminal Records Checks (D1)

C6: Page 1 of 1

**VERMONT SCHOOL BOARDS ASSOCIATION
PROCEDURES FOR
HANDLING COMPLAINTS
(Appendix D)**

VSBA 2001 Vermont Model Policy Manual

CODE C6-R

PROCEDURES FOR HANDLING COMPLAINTS OF DISCRIMINATION

The non-discrimination coordinator for the _____ School District for the period (year to year) is

(Title) _____

(Where located) _____

(Phone Number) _____

Definitions

1. A ***grievance*** is a claim made by a student, teacher or employee of the School District or member of the public that he or she has been subjected to discrimination because of specific actions of the School Board or its employees.
2. A ***grievant*** shall be a student(s) and/or parent(s) employee, or applicant making the claim.

Intent

Nothing contained within this grievance procedure shall be construed as limiting the right of an aggrieved person or persons to informally discuss a problem with the school administration or staff. Should such an informal process fail to resolve the situation then a formal filing of a grievance may be made in accordance with the following procedure:

Procedures (all days are calendar days)

1. Within 15 days of an alleged violation of this policy, the aggrieved shall submit in writing to the Superintendent or designee the nature of the grievance and the remedy sought. The Superintendent should arrange for a meeting within 15 days of receipt of the grievance. The Superintendent shall provide a written answer on the grievance within 5 days of the meeting.
2. If the grievance is not resolved at Step I, then the aggrieved may, within 10 days of the denial, request in writing that the School Board or a committee of the School Board hear the grievance. The chair of the School Board or designee shall schedule a meeting before the Board or a committee of the Board within 15 days of receipt of the request. Such a meeting will be in a public or in an executive session depending upon the circumstances. The Board or its committee shall provide a written answer on the grievance within 5 days of the Board's next regularly scheduled meeting. The decision of the Board or its committee shall be final and binding to the extent of the jurisdictional limits and authority of the School Board.

C6-R: Page 1 of 1

POLICY/PROCEDURES CHECKLIST
(Appendix E)

SECTION 504 POLICY/PROCEDURES CHECKLIST

Does the school district provide, via policy or procedures:

1. _____ An up-to-date self-evaluation, including an opportunity for persons with disabilities, their advocacy organizations, and other interested individuals, to submit comments? [See 28 CFR Sec.35.1051]
2. _____ The following: [See 34 CFR Sec. 104.8 and 104.32(b); 28 CFR Sec. 35.106]
 - a. continuing Public notice that your district does not discriminate on the basis of disability with regard to admission or access to and treatment or employment in your programs and activities?
 - b. continuing internal notice (i.e., to staff and students) to the same effect?
3. _____ Identification in those notices of a Sec. 504 coordinator and an ADA coordinator? [See 34 CFR Sec. 104.7(a) and 104.8; 28 CFR Sec. 35.107(a)]
4. _____ A grievance Procedure for disability-discrimination complaints that: See 34 CFR Sec. 104.7(b); 28 CFR Sec. 35.107(b)
 - a. incorporates appropriate due process standards?
 - b. provides for the prompt and equitable resolution of those complaints?
5. _____ Reasonable accommodations for qualified applicants and employees with disabilities, such as each of the following unless it demonstrably would impose an "undue hardship" on the operation of the program:
 - a. making facilities used by employees readily accessible to and usable by handicapped persons?
 - b. modifications or adjustments to the job application process that enable a qualified applicant with a disability to be considered?
 - c. modifications or adjustments in the work environment that enable a qualified individual with a disability to perform the essential functions of that position?
 - d. appropriate adjustment or modification of examinations, training materials, or policies?
 - e. job restructuring and part-time or modified work schedules?
 - f. reassignment to a vacant position?
 - g. acquisition or modification of equipment or devices?
 - h. the provision of readers or interpreters or other similar actions?
6. _____ Not using employment tests or other selection criteria that tend to screen out persons with disabilities unless these criteria are demonstrably job related and unless effective alternatives are not available? [See 34 CFR Sec. 104.13(a); 29 CFR Sec.1630.10]
7. _____ Not making Preemployment inquiries as to whether the applicant is an individual with a disability? [See 34 CFR Sec. 104.14(a); 29 CFR Sec. 1630.13]
8. _____ Ready accessibility to individuals with disabilities to each of your programs and activities when viewed in its entirety? [See 34 CFR Sec. 104.22; 28 CFR Sec. 35.150]
9. _____ An individualized evaluation (in the native language) for any student who is believed to: [See 34 CFR Sec.104.35 and 104.3(j)]
 - a. have a physical or mental impairment which substantially limits one or more major life activities,
 - b. have a record of such impairment, or
 - c. be regarded as having such an impairment?

- 10._____ For each student meeting any of the criteria in item #9, an "appropriate education," which is defined as general or special education and related aids and services that are designed to meet his/her individual needs as adequately as the needs of non-disabled persons are met and that are based upon procedures referred to in item #11? [See 34 CFR Sec. 104.33]
- 11._____ Parental notice (in the native language) of the rights to: [See 34 CFR Sec. 104.36]
- 12._____ If separate classrooms for special education, that they be comparable facilities to those for general education? [See 34 CFR Sec. 104.34(c)]
- 13._____ Nonacademic and extracurricular services and activities so as to provide handicapped persons with an equal opportunity for participation? [See 34 CFR Sec. 104.37]
- 14._____ Integrated settings to the maximum extent appropriate to the needs of qualified individuals with disabilities? [See 34 CFR Sec. 104.34; 28 CFR Sec. 35.130(d)]
- 15._____ Reasonable access to your programs or activities, if any, of: [See 34 CFR Sec. 104.38]
 - a. preschool education?
 - b. day care?
 - c. adult education?
- 16._____ Furnishing auxiliary aids and services (unless it would result in an undue burden or a fundamental alteration in the program) to employees, students, parents, and members of the public who have disabilities to the extent necessary for communications with them to be equally effective as communications with other persons, such as: [See 28 CFR Sec. 35.160.164]
 - a. telephone communications devices for the deaf (TDD's)?
 - b. signage with international symbol for accessibility?
- 17._____ Reasonable modifications generally in policies, practices, and procedures when necessary to avoid disability-based discrimination unless the district can prove that the modification would fundamentally alter the nature of the service, program or activity. [See 28 CFR Sec. 35.130(b)(7)]

Original source: Guide for Educators and Parents in Nebraska Schools, 1994.
<http://www.nde.state.ne.us/SPED/schsupport/schsupportthp.html>

**ELIGIBILITY CHECKLIST FOR
DISABILITY LEARNING
(Appendix F)**

Eligibility Checklist for Section 504 Disability in Learning

To qualify for accommodations for a disability in learning under Section 504, a student must have a physical or mental impairment that **substantially** limits his/her learning.

If the student needs individually designed instruction due to the severity of the impairment, then the student should be referred for evaluation and possible placement under Article 7.

If a student does not need accommodations or modifications at school beyond those normally made available to all students, then (s)he is not eligible for an accommodation plan under Section 504.

The following questions will help guide the committee in determining whether the student's learning is substantially limited as a result of the impairment. Generally, there should be multiple indications of difficulty before the committee determines the student's learning is substantially limited.

Yes	No	
_____	_____	1. Has the student demonstrated a consistent need for substantially more time to complete homework assignments than required by typical students?
_____	_____	2. Has the student demonstrated a consistent need for substantially more time to complete in-class assignments than required by typical students?
_____	_____	3. Does the student consistently need modified testing to be able to demonstrate his/her knowledge?
_____	_____	4. Does the student have significant difficulty with planning, organization and performing school-related assignments and other activities?
_____	_____	5. Is the student chronically absent or tardy due to a physical or mental impairment?
_____	_____	6. If so, are those absences/tardies significantly interfering with his/her educational progress?
_____	_____	7. Does the student exhibit frequent behaviors (such as impulsivity, inattentiveness, aggression, drowsiness) that are commonly associated with the student's physical or mental impairment or the medication that the student is taking? If yes, describe those behaviors and indicate specifically the impact on school performance. _____ _____
_____	_____	8. Do those behaviors significantly interfere with the student's educational progress?

- _____ 9. Has the student experienced a ***significant decline*** in academic performance that is not due to any cause other than the physical or mental impairment?
- _____ 10. Does the student have ***significant discipline problems*** that are not due to any cause other than the physical or mental impairment?
- _____ 11. After appropriate intervention strategies have been attempted in the regular education classroom, does the student still have significant learning problems?
- _____ 12. Does the student's physical or mental impairment substantially limit his/her ability to learn in any manner not already indicated? If so, explain:

**CLASSROOM AND FACILITY
ACCOMMODATIONS
(Appendix G)**

CLASSROOM AND FACILITY ACCOMMODATIONS

As local districts develop policies and procedures for guiding the referral and identification of students determined to be disabled under Section 504, it is critical that information concerning this law and its impact on local school districts be shared with principals and building-level staff. The intent of Section 504 is to "accommodate" for differences within the regular education environment. For this to be accomplished, all staff must given specific information concerning the district's procedures for dealing with Section 504 referrals.

As individual students are identified, the classroom teacher may need specific training in the area of the identified disabilities. The following classroom/facility accommodations are examples of ways to address Section 504 disabilities in the regular education environment.

I. Communication

A. There may be a need to modify parent/student/teacher communications. For example:

- develop a daily/weekly journal
- develop parent/student/school contacts
- schedule periodic parent/teacher meetings
- provide parents with duplicate sets of texts

B. There may be a need to modify staff communications. For example:

- identify resource staff
- network with other staff
- schedule building team meetings
- maintain on-going communication with building principal

C. There may be a need to modify school/community agency communication. For example, with parent consent:

- identify and communicate with appropriate agency personnel working with student
- assist in agency referrals
- provide appropriate carryover in the school environment

II. Organization/Management

A. There may be a need to modify the instructional day. For example:

- allow student more time to pass in hallways
- modify class schedule

B. There may be a need to modify the classroom organization/structure. For example:

- adjust placement of student within classroom (e.g., study carrel, proximity to teacher, etc.)
- increase/decrease opportunity for movement
- determine appropriate classroom assignment (e.g., open versus structured)
- reduce external stimuli

C. There may be a need to modify the district's policies/procedures. For example:

- allow increase in number of excused absences for health reasons
- adjust transportation/parking arrangements
- approve early dismissal for service agency appointments

III. Alternative Teaching Strategies

A. There may be need to modify teaching methods. For example:

- adjust testing procedures (e.g., length of time, administer orally, tape record answers)
- individualize classroom/homework assignments
- utilize technology (computers, tape recorders, calculators, etc.)

B. There may be a need to modify materials. For example:

- utilize legible materials
- utilize materials that address the student's learning style (e.g., visual, tactile, auditory, etc.)
- adjust reading level of materials

IV. Student Precautions

A. There may be a need to modify the classroom/building climate for health purposes. For example:

- use an air purifier in classroom
- control temperature
- accommodate specific allergic reactions

B. There may be a need to modify classroom/building to accommodate equipment needs. For example:

- plan for evacuation for wheelchair-bound students
- schedule classes in accessible areas

C. There may be a need to modify building health/safety procedures. For example:

- administer medication
- apply universal precautions
- accommodate special diets

**SAMPLE STUDENT
ACCOMMODATION PLANS
(Appendix H)**

SAMPLE STUDENT ACCOMMODATION PLAN

NAME: _____ BIRTHDATE: _____ GRADE: _____

SCHOOL: _____ DATE OF MEETING: _____

1. Describe the nature of the concern:

2. Describe the basis for the determination of disability (if any):

3. Describe how the disability affects a major life activity:

4. Describe the reasonable accommodations that are necessary:

Review/Reassessment Date: _____
(*must be completed*)

Participants (Name and Title)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

cc: Student's Cumulative File

Attachement: Information Regarding Section 304 of the Rehabilitation Act of 1973

Student 504 Accommodation Plan - Sample Plan #1

Name _____ Birth date: _____ Grade: _____

School: _____ Meeting Date: _____ Plan Coordinator: _____

In attendance: _____

Nature of concern: _____

Basis of determination of disability (if any): ☐ none ☐ physical/physiological ☐ mental/psychological

Description of the basis for the determination of disability: _____

Major life activity substantially limited: _____

Reasonable, necessary accommodations

Issues to target	Action to be taken	Person responsible	When/Frequency	How know it's working	Results

Plan will be reviewed on (required): _____ by: _____ Plan will be given to: _____

Any funding or other resources (include source) needed to implement the plan: _____

Other support(s) necessary for those implementing this plan (including family members) to be successful in addressing the students needs: _____

Student 504 Accommodation Plan - Sample Plan #2

Name _____ Birth date: _____ Grade: _____
School: _____ Meeting Date: _____ Plan Coordinator: _____

Reasonable, necessary accommodations

Issue(s) to target	Action to be taken	Person(s) responsible	When/Frequency	Evaluation criteria	Results

Plan will be reviewed on (*required*): _____ by: _____ Plan will be given to: _____
Any funding or other resources needed to implement the plan and the source(s): _____

Other support(s) necessary for those implementing this plan (including family members) to be successful in addressing the students needs: _____

Attachment: Information Regarding Section 504 of the Rehabilitation Act of 1973

(Over)

Student 504 Accommodation Referral Planning - Sample Plan #2

Name _____ Birth date: _____ Grade: _____
School: _____ Meeting Date: _____ Referred By: _____

In attendance: _____
(Name & Title) _____

Nature of concern: _____

Basis of determination of disability (if any): ____ none ____ physical/physiological ____ mental/psychological

Description of the basis for the determination of disability: _____

Major life activity substantially limited: _____

Salient Ideas:

-
-
-
-
-

(Over)

**VERMONT STATE BOARD OF EDUCATION
MANUAL OF RULES AND PRACTICES
RULE 4312
(Appendix I)**

Approved 8/16/2001

4312 Discipline Procedures for Students Who are Not Eligible for Special Education Services, but Who Are or May Be Qualified Individuals with Disabilities under Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794; 34 CFR §104 et seq.)

In addition to the general disciplinary procedures found within Rule 4311, and in accordance with 34 CFR §104.36, the following procedures apply to children who are qualified individuals with disabilities as defined by Section 504 of the Rehabilitation Act of 1973 (hereinafter Section 504).

- (1) A Section 504 student shall not be removed from his or her current educational placement for disciplinary reasons for more than 10 consecutive school days in a school year unless the following procedures have been completed:
 - (a) A re-evaluation, as defined by 34 CFR §104.35; and
 - (b) A determination by the student's Section 504 team that the conduct is not a manifestation of his or her disability.
- (2) A Section 504 student shall not be removed from his or her current educational placement for disciplinary reasons for more than 10 cumulative days in a school year when the removals constitute a change in placement as defined in Rule 2360.2(d)(1) unless the following procedures have been completed:
 - (a) A re-evaluation as defined by 34 CFR §104.35; and
 - (b) A determination by the student's Section 504 team that the conduct is not a manifestation of his or her disability.
- (3) When it is determined by a student's 504 team that the conduct is not a manifestation of the student's qualifying disability, the student may be disciplined in the same manner, and subject to the same disciplinary consequences, as a non-disabled child, including suspension or expulsion without the provision of services.
- (4) When it is determined by a student's Section 504 team that the conduct is a manifestation of his or her qualifying disability, a change in program or placement may be implemented by the student's Section 504 team and the student's section 504 team may respond to the conduct by designing, amending and/or enforcing a plan of behavior management.

- (5) If, at the time of the occurrence of conduct that gives rise to consideration of removal of a student from his or her current educational placement for more than 10 consecutive school days in a school year, the student is believed to be a qualified individual with a disability under Section 504, a Section 504 evaluation shall be completed prior to imposition of the removal.
 - (a) If the evaluation results in a determination that the student is a qualified individual with a disability under Section 504, the discipline procedures in this rule shall be followed.
 - (b) If the evaluation results in a determination that the student is not a qualified individual with a disability under Section 504, the discipline procedures in Rule 4311 shall be followed.
- (6) If, at the time of the occurrence of conduct that gives rise to consideration of removal of a student who is believed to be a qualified individual with a disability under Section 504 for more than 10 cumulative school days in a school year, and the removals constitute a change in placement as defined in Rule 2360.2(d)(1), a Section 504 evaluation shall be completed prior to imposition of the removal.
 - (a) If the evaluation results in a determination that the student is a qualified individual with a disability under Section 504, the discipline procedures in this rule shall be followed.
 - (b) If the evaluation results in a determination that the student is not a qualified individual with a disability under Section 504, the discipline procedures in Rule 4311 shall be followed.
- (7) If a child who is a qualified individual under Section 504 possesses or carries a weapon, as defined in Rule 4313.9(a), to school or at a school function, he or she may be placed in an interim alternative educational setting (IAES) in accordance with the procedures set forth in Rule 4313.9 and Rule 1253. The student's 504 team shall determine the IAES, and the services provided in the IAES, in accordance with the procedures set forth in Rule 4313.9. It is the intent of this section to discipline a child who is a qualified individual under Section 504 in the same manner as students who are eligible for special education when they possess weapons at school or at school functions.

- (8) When a parent disagrees with disciplinary action taken by a school district, the parent may request an impartial due process hearing, and the procedures in Rules 2365.1.6(c) through 2365.1.9 shall apply. In addition to or in lieu of a due process hearing a parent may file a complaint with the U.S. Department of Education Office for Civil Rights.
- (9) A hearing officer may order a change in the placement of a child who is a qualified individual under Section 504 to an appropriate IAES for not more than 45 calendar days if the hearing officer, in an expedited due process hearing:
 - (a) Determines that the school district has demonstrated by substantial evidence which, for purposes of this section, shall mean a preponderance of the evidence, that maintaining the current placement of the child is substantially likely to result in injury to the child or others.
 - (b) Considers the appropriateness of the child's current placement;
 - (c) Considers whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services; and
 - (d) Determines that the IAES that is proposed by school personnel will enable the child to continue to progress in the general curriculum. The services provided to and modifications made for the child in the IAES shall be designed to address and prevent the child's offending behavior.
- (10) This Rule (4312) shall not apply when a responsible agency takes disciplinary action against a Section 504 student if:
 - (a) The misconduct for which the student is being disciplined pertains to the use or possession of illegal drugs or alcohol at school or at a school function; and
 - (b) The student is currently engaging in the use of alcohol or illegal drugs.

In this instance, the Section 504 student shall be disciplined in accordance with Rule 4311.

**OCR ANSWERS TO QUESTIONS
ON PROTECTING STUDENTS
WITH DISABILITIES
(Appendix J)**

**U.S. Department of Education
Office for Civil Rights**

PROTECTING STUDENTS WITH DISABILITIES

**Frequently Asked Questions
about Section 504 and the Education of Children with Disabilities**

Introduction
Interrelationship of IDEA and Section 504
Protected Students
Evaluation
Placement
Procedural Safeguards
Terms

The Chicago Office of the Office for Civil Rights developed these materials in response to numerous requests from educators, parents and advocates in Wisconsin to clarify the requirements of Section 504 of the Rehabilitation Act of 1973, as amended, in the area of elementary and secondary education. In partnership with the Wisconsin Department of Public Instruction and the Wisconsin Council of Administrators of Special Services, OCR invited over 60 administrators, educators, parents and advocates to participate in three focus groups, at Eau Claire, Green Bay and Madison, respectively.

INTRODUCTION

An important goal of the Office for Civil Rights (OCR) is to foster partnerships between school districts and parents to address the needs of students with disabilities. Such partnerships empower all parties to secure quality education. OCR has experienced a steady influx of complaints and inquiries in the area of elementary and secondary education involving Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794 (Section 504). Most of these concern identification of students who are protected by Section 504 and the means to obtain an appropriate education for such students. OCR reached out to parents and school districts to determine the kinds of assistance they needed.

Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive federal funds from the U.S. Department of Education (ED). Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"

OCR enforces Section 504 in programs and activities that receive funds from ED. Recipients of these funds include public school districts, institutions of higher education, and other state and local education agencies. The regulation implementing Section 504 in the context of educational institutions appears at 34 C.F.R. Part 104.

The Section 504 regulation requires a school district to provide a "free appropriate public education" (FAPE) to each qualified student with a disability who is in the school district's jurisdiction, regardless of the nature or severity of the disability. FAPE consists of the provision of regular or special education and related aids and services designed to meet the student's individual needs.

This resource document clarifies pertinent requirements of Section 504 and responds to specific questions raised by parents and school districts.

For additional information, please contact the Office for Civil Rights.

INTERRELATIONSHIP OF IDEA AND SECTION 504

1. What is the jurisdiction of the Office for Civil Rights (OCR), the Office of Special Education and Rehabilitative Services (OSERS) and state departments of education/instruction regarding educational services to students with disabilities?

OCR, a component of the U.S. Department of Education, enforces Section 504 of the Rehabilitation Act of 1973, as amended, (Section 504) a civil rights statute which prohibits discrimination against individuals with disabilities. OCR also enforces Title II of the Americans with Disabilities Act of 1990 (ADA), which extends this prohibition against discrimination to the full range of state or local government services (including public schools), programs, or activities regardless of whether they receive any federal funding. The standards adopted by the ADA were designed not to restrict the rights or remedies available under Section 504. The Title II regulations applicable to free and appropriate public education issues do not provide greater protection than applicable Section 504 regulations. This guidance focuses on Section 504.

The Office of Special Education and Rehabilitative Services (OSERS), also a component of the U.S. Department of Education, administers the Individuals with Disabilities Education Act (IDEA), a statute which funds special education programs.

Each state educational agency is responsible for administering IDEA within the state and distributing the funds for special education programs.

Section 504 prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance from the U.S. Department of Education. The ADA prohibits discrimination on the basis of disability by state and local governments. IDEA is a grant statute and attaches many specific conditions to the receipt of Federal IDEA funds. Section 504 and the ADA are antidiscrimination laws and do not provide any type of funding.

2. How does OCR get involved in disability issues within a school district?

OCR receives complaints from parents, students or advocates; 2) OCR provides technical assistance to school districts, parents or advocates; and 3) OCR initiates reviews or specific partnership initiatives with school districts to address disability issues.

3. Where can a school district, parent, or student get information on Section 504?

OCR provides technical assistance to school districts, parents, and students upon request.

4. What services are available for students who qualify under Section 504?

Section 504 requires recipients to provide to students with disabilities appropriate educational services designed to meet the individual needs of such students to the same extent as the needs of students without disabilities are met. An appropriate education for a student with a disability under the Section 504 regulations could consist of education in regular classrooms, education in regular classes with supplementary services, and/or special education and related services.

5. Does OCR examine individual placement or other educational decisions for students with disabilities?

Except in extraordinary circumstances, OCR does not review the result of individual placement or other educational decisions so long as the school district complies with the procedural requirements of Section 504 relating to identification and location of students with disabilities, evaluation of such students, and due process. Accordingly, OCR generally will not evaluate the content of a Section 504 plan or of an individualized education program (IEP); rather, any disagreement can be resolved through a due process hearing. The hearing would be conducted under Section 504 or the IDEA, whichever is applicable.

OCR will examine procedures by which school districts identify and evaluate students with disabilities and the procedural safeguards which those school districts provide students. OCR will also examine incidents in which students with disabilities are allegedly subjected to treatment which is different from the treatment to which similarly situated students without disabilities are subjected. Such incidents may involve the unwarranted exclusion of disabled students from educational programs and services.

6. What protections does OCR provide against retaliation?

A recipient is prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Section 504.

7. Does OCR mediate complaints?

OCR does not engage in formal mediation. However, OCR may offer to facilitate mediation, referred to as "Resolution between the Parties," to resolve a complaint filed under Section 504. This approach brings the parties together so that they may discuss possible resolution of the complaint immediately. If both parties are willing to utilize this approach, OCR will work with the parties to facilitate resolution by providing each an understanding of pertinent legal standards and possible remedies. An agreement reached between the parties is not monitored by OCR.

8. What are the appeal rights with OCR?

OCR is committed to ensuring that every complaint is appropriately resolved. If a complainant has questions or concerns about an OCR determination, he or she may contact the OCR staff person whose name appears in the complaint resolution letter. The complainant should address his or her concerns with as much specificity as possible, focusing on factual or legal questions that would change the resolution of the case. Should a complainant continue to have questions or concerns, he or she is advised to contact the Director of the responsible OCR field office. The Director will review the appropriateness of the complaint resolution. If the complainant remains dissatisfied, he or she may appeal to the Deputy Assistant Secretary for Enforcement.

9. What does noncompliance with Section 504 mean?

A school district is out of compliance when it is violating any provision of the Section 504 statute or regulations.

10. What sanctions can OCR impose on a school district that is out of compliance?

OCR initially attempts to bring the school district into voluntary compliance through negotiation of a corrective action agreement. If OCR is unable to achieve voluntary compliance, OCR will initiate enforcement action. OCR may: (1) initiate administrative proceedings to terminate Department of Education financial assistance to the recipient; or (2) refer the case to the Department of Justice for judicial proceedings.

11. Who has ultimate authority to enforce Section 504?

In the educational context, OCR has been given administrative authority to enforce Section 504. Section 504 is a Federal statute that may be enforced through the Department's administrative process or through the Federal court system. In addition, a person may at any time file a private lawsuit against a school district.

STUDENTS PROTECTED UNDER SECTION 504

Section 504 covers qualified students with disabilities who attend schools receiving Federal financial assistance. To be protected under Section 504, a student must be determined to: 1) have a physical or mental impairment that substantially limits one or more major life activities; 2) have a record of such an impairment, or 3) be regarded as having such an impairment. Section 504 requires that school districts provide a free and appropriate public education (FAPE) to qualified students in their jurisdictions who have a physical or mental impairment that substantially limits one or more major life activities.

12. What is a physical or mental impairment that substantially limits a major life activity?

The determination of whether a student has a physical or mental impairment that substantially limits a major life activity must be made on the basis of an individual inquiry. The Section 504 regulation, at 34 C.F.R. 104.3(j)(2)(i), defines a physical or mental impairment as any physiological disorder or condition, cosmetic disfigurement, or

anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The regulation does not set forth an exhaustive list of specific diseases and conditions that may constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of such a list.

Major life activities, as defined in the Section 504 regulation at 34 C.F.R. 104.3(j)(2)(ii), include functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working. This list is not exhaustive. Other functions can be major life activities for purposes of Section 504.

13. Does the meaning of the phrase "qualified student with a disability" differ on the basis of a student's educational level, i.e., elementary and secondary versus postsecondary?

Yes. At the elementary and secondary educational level, a "qualified student with a disability" is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under state law to provide elementary and secondary educational services to students with disabilities; or a student to whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act (IDEA).

At the postsecondary educational level, a qualified student with a disability is a student with a disability who meets the academic and technical standards requisite for admission or participation in the institution's educational program or activity.

14. Does the nature of services to which a student is entitled under Section 504 differ by educational level?

Yes. Elementary and secondary recipients are required to provide a free, appropriate public education to qualified students with disabilities. Such an education consists of regular or special education and related aids and services designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met.

At the postsecondary level, the recipient is required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in a school's program. Recipients are not required to make adjustments or provide aids or services that would result in a fundamental alteration of a recipient's program or impose an undue burden.

15. Once a student is identified as eligible for services under Section 504, is that student always entitled to such services?

No. The protections of Section 504 extend only to individuals who meet the regulatory definition of a person with a disability. If a recipient school district re-evaluates a student in accordance with the Section 504 regulation at 34 C.F.R. 104.35 and determines that the student's mental or physical impairment no longer substantially limits his/her ability to learn or any other major life activity, the student is no longer eligible for services under Section 504.

16. Are current illegal users of drugs excluded from protection under Section 504?

Generally, yes. Section 504 excludes from the definition of a student with a disability, and from 504 protection, any student who is currently engaged in the illegal use of drugs (with exceptions for persons in rehabilitation programs).

17. Are current users of alcohol excluded from protection under Section 504?

No. Section 504's definition of a student with a disability does not exclude users of alcohol. However, Section 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.

EVALUATION

At the elementary and secondary school level, determining whether a child is a qualified disabled student under Section 504 begins with the evaluation process. Section 504 requires the use of evaluation procedures that ensure that children are not misclassified, unnecessarily labeled as having a disability, or incorrectly placed, based on inappropriate selection, administration, or interpretation of evaluation materials.

18. What is an appropriate evaluation under Section 504?

Recipient school districts must establish standards and procedures for initial evaluations and periodic re-evaluations of students who need or are believed to need special education and/or related services because of disability. The Section 504 regulation, at 34 C.F.R. 104.35(b), requires school districts to individually evaluate a student before classifying the student as having a disability or providing the student with special education. Tests used for this purpose must be selected and administered so as best to ensure that the test results accurately reflect the student's aptitude or achievement or other factor being measured rather than reflect the student's disability, except where those are the factors being measured. Section 504 also requires that tests and other evaluation materials include those tailored to evaluate the specific areas of educational need and not merely those designed to provide a single intelligence quotient. The tests and other evaluation materials must be validated for the specific purpose for which they are used and appropriately administered by trained personnel.

19. How much is enough information to document that a student has a disability?

The amount of information required is determined by the multi-disciplinary committee gathered to evaluate the student. The committee should include persons knowledgeable

about the student, the meaning of the evaluation data, and the placement options. The committee members must determine if they have enough information to make a knowledgeable decision as to whether or not the student has a disability. The Section 504 regulation, at 34 C.F.R. 104.35(c), requires that school districts draw from a variety of sources in the evaluation process so that the possibility of error is minimized. The information obtained from all such sources must be documented and all significant factors related to the student's learning process must be considered. These sources and factors may include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior. In evaluating a student suspected of having a disability, it is unacceptable to rely on presumptions and stereotypes regarding persons with disabilities or classes of such persons. Compliance with the IDEA regarding the group of persons present when an evaluation or placement decision is made is satisfactory under Section 504.

20. What process should a school district use to identify students eligible for services under Section 504? Is it the same process as that employed in identifying students eligible for services under the IDEA?

School districts may use the same process initially to evaluate the needs of students under Section 504 as they use to evaluate the needs of students under the IDEA. If school districts choose to adopt a separate process for evaluating the needs of students under Section 504, they must follow the requirements for evaluation specified in the Section 504 regulation at 34 C.F.R. 104.35.

21. Must school districts consider "mitigating measures" used by a student in determining whether the student has a disability under Section 504?

Yes. A school district must consider a student's use of mitigating measures in determining whether the student is substantially limited in a major life activity. "Mitigating measures" are devices or practices that a person uses to correct for or reduce the effects of that person's mental or physical impairment. Examples include corrective eyeglasses and medications. A person who experiences no substantial limitation in any major life activity when using a mitigating measure does not meet the definition of a person with a disability and would not be entitled to FAPE under Section 504.

22. Does OCR endorse a single formula or scale that measures substantial limitation?

No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulation, at 34 C.F.R. 104.35 (c), requires that a group of knowledgeable persons draw upon information from a variety of sources in making this determination.

23. Are there any impairments which automatically qualify a student for protection under Section 504?

No. An impairment in and of itself does not qualify a student for protection under Section 504. The impairment must substantially limit one or more major life activities in order to qualify a student for protection under Section 504.

24. Can a medical diagnosis suffice as an evaluation for the purpose of providing FAPE?

No. A physician's medical diagnosis may be considered among other sources in evaluating a student with a disability or believed to have a disability which substantially limits a major life activity. Other sources to be considered, along with the medical diagnosis, include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.

25. Does a medical diagnosis of an illness automatically qualify a student for services under Section 504?

No. A medical diagnosis of an illness does not automatically qualify a student for services under Section 504. The illness must cause a substantial limitation on the student's ability to learn or other major life activities. For example, a student who has a physical or mental impairment would not be considered a student in need of services under Section 504 if the impairment does not in any way limit the student's ability to learn or other major life activity, or only results in some minor limitation in that regard.

26. How should a recipient school district handle an outside independent evaluation? Do all data brought to a multi-disciplinary committee need to be considered and given equal weight?

The results of an outside independent evaluation may be one of many sources to consider. Multi-disciplinary committees must draw from a variety of sources in the evaluation process so that the possibility of error is minimized. All significant factors related to the subject student's learning process must be considered. These sources and factors include aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior, among others. Information from all sources must be documented and considered by knowledgeable committee members. The weight of the information is determined by the committee given the student's individual circumstances.

27. What should a recipient school district do if a parent refuses to consent to a case study evaluation under the Individuals with Disabilities Education Act (IDEA), but demands a Section 504 plan for a student without further evaluation?

Section 504 requires informed parental permission for initial evaluations. If a parent refuses consent for an initial evaluation and a recipient school district suspects a student has a disability, the IDEA and Section 504 provide that school districts may use due process hearing procedures to override the parents' denial of consent.

28. Who in the evaluation process makes the ultimate decision regarding a student's eligibility for services under Section 504?

The Section 504 regulation at 34 C.F.R.104.35 (c) (3) requires that school districts ensure that the determination that a student is eligible for special education and/or related aids and services be made by a group of persons, including persons knowledgeable about the

meaning of the evaluation data and knowledgeable about the placement options. If a parent disagrees with the determination, he or she may request a due process hearing.

- 29. Once a student is identified as eligible for services under Section 504, is there an annual or triennial review requirement? If so, what is the appropriate process to be used? Or is it appropriate to keep the same Section 504 plan in place indefinitely after a student has been identified?**

Periodic re-evaluation is required. This may be conducted in accordance with the IDEA regulation, which requires re-evaluation at three-year intervals or more frequently if conditions warrant, or if the child's parent or teacher requests a re-evaluation.

- 30. Is a Section 504 re-evaluation similar to an IDEA re-evaluation? How often should it be done?**

Yes. Section 504 specifies that re-evaluations in accordance with the IDEA comply with Section 504. The Section 504 regulation requires that re-evaluations be conducted periodically. Section 504 also requires a school district to conduct a re-evaluation prior to a significant change of placement. OCR considers an exclusion from the educational program of more than 10 school days a significant change of placement. OCR would also consider transferring a student from one type of program to another or terminating or significantly reducing a related service a significant change in placement.

- 31. What is reasonable justification for referring a student for evaluation for services under Section 504?**

School districts may always use regular education intervention strategies to assist students with difficulties in school. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification to regular education if the student, because of disability, needs or is believed to need such services.

- 32. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student's parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services?**

The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.

- 33. A student has a disability referenced in the IDEA, but does not require special education services. Is such a student eligible for services under Section 504?**

The student may be eligible for services under Section 504. The school district must determine whether the student has an impairment which substantially limits his or her ability to learn or other major life activities and, if so, make an individualized determination of the child's educational needs for regular or special education or related

aids or services. For example, such a student may receive adjustments in the regular classroom.

34. How should a recipient school district regard a temporary impairment?

A temporary impairment does not constitute a disability for purposes of Section 504 unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period of time. The issue of whether a temporary impairment is substantial enough to be a disability must be resolved on a case-by-case basis, taking into consideration both the duration (or expected duration) of the impairment and the extent to which it actually limits a major life activity of the affected individual.

PLACEMENT

Once a student is identified as being eligible for regular or special education and related aids or services, a decision must be made regarding the type of services the student needs.

35. If a student qualifies for services under both the IDEA and Section 504, must a school district develop both an individualized education program (IEP) under the IDEA and a Section 504 plan under Section 504?

No. If a student is eligible under IDEA, he or she must have an IEP. Under the Section 504 regulations, one way to meet Section 504 requirements is to comply with IDEA.

36. Must a school district develop a Section 504 plan for a student who either "has a record of disability" or is "regarded as disabled"?

No. In elementary and secondary schools, unless a student actually has a disabling condition that substantially limits a major life activity, the mere fact that a student has a "record of" or is "regarded as" disabled is insufficient, in itself, to trigger those Section 504 protections that require the provision of a free and appropriate public education (FAPE). The phrases "has a record of disability" and "is regarded as disabled" are meant to reach the situation in which a student either does not currently have or never had a disability, but is treated by others as such.

37. What is the receiving school district's responsibility under Section 504 toward a student with a Section 504 plan who transfers from another district?

If a student with a disability transfers to a district from another school district with a Section 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines the plan is appropriate, the district is required to implement the plan. If the district determines that the plan is inappropriate, the district is to evaluate the student consistent with the Section 504 procedures at 34 C.F.R. 104.35 and determine which educational program is appropriate for the student.

38. What are the responsibilities of regular education teachers with respect to implementation of Section 504 plans? What are the consequences if the district fails to implement the plans?

Regular education teachers must implement the provisions of Section 504 plans when those plans govern the teachers' treatment of students for whom they are responsible. If the teachers fail to implement the plans, such failure can cause the school district to be in noncompliance with Section 504.

39. What is the difference between a regular education intervention plan and a Section 504 plan?

A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school. School districts vary in how they address performance problems of regular education students. Some districts employ teams at individual schools, commonly referred to as "building teams." These teams are designed to provide regular education classroom teachers with instructional support and strategies for helping students in need of assistance. These teams are typically composed of regular and special education teachers who provide ideas to classroom teachers on methods for helping students experiencing academic or behavioral problems. The team usually records its ideas in a written regular education intervention plan. The team meets with an affected student's classroom teacher(s) and recommends strategies to address the student's problems within the regular education environment. The team then follows the responsible teacher(s) to determine whether the student's performance or behavior has improved. In addition to building teams, districts may utilize other regular education intervention methods, including before-school and after-school programs, tutoring programs, and mentoring programs.

PROCEDURAL SAFEGUARDS

Public elementary and secondary schools must employ procedural safeguards regarding the identification, evaluation, or educational placement of persons who, because of disability, need or are believed to need special instruction or related services.

40. Must a recipient school district obtain parental consent prior to initiating a Section 504 evaluation?

Yes. OCR has interpreted Section 504 to require districts to obtain parental permission for initial evaluations. If a district suspects a student needs or is believed to need special instruction or related services and parental consent is withheld, districts may use due process hearing procedures to override the parents' denial of consent for an initial evaluation.

41. If so, in what form is consent required?

Section 504 is silent on the form of parental consent required. OCR has accepted written consent as compliance. IDEA as well as many state laws also require written consent prior to initiating an evaluation.

42. What can a recipient school district do if a parent withholds consent for a student to secure services under Section 504 after a student is determined eligible for services?

Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.

43. What procedural safeguards are required under Section 504?

Recipient school districts are required to establish and implement procedural safeguards that include notice, an opportunity for parents to review relevant records, an impartial hearing with opportunity for participation by the student's parents or guardian, representation by counsel and a review procedure.

44. What is a recipient school district's responsibility under Section 504 to provide information to parents and students about its evaluation and placement process?

Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children and explaining the parents' right to review educational records and appeal any decision regarding evaluation and placement through an impartial hearing.

45. Is there a mediation requirement under Section 504?

No.

TERMINOLOGY

The following terms may be confusing and/or are frequently used incorrectly in the elementary and secondary school context.

Accommodation: a term correctly used in the context of public accommodations and facilities; an individual with a disability may not be excluded, denied services, segregated or otherwise treated differently than other individuals by a public accommodation or commercial facility; (term is not to be confused with "reasonable accommodation," discussed below)

Equal access: equal opportunity of a qualified person with a disability to participate in or benefit from educational aids, benefits, or services

Free and appropriate public education (FAPE): a term used in the elementary and secondary school context; refers to the provision of regular or special education and related aids and services that are designed to meet individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and is based upon adherence to procedures that satisfy the Section 504 requirements pertaining to educational setting, evaluation and placement, and procedural safeguards

Placement: a term used in the elementary and secondary school context; refers to regular and/or special educational program in which a student receives educational and/or related services

Reasonable accommodation: a term used in the employment context to refer to modifications or adjustments employers make to a job application process, the work environment, the manner or circumstances under which the position held or desired is customarily performed, or that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment; this term is sometimes used incorrectly to refer to related aids and services in the elementary and secondary school context or to refer to academic adjustments and auxiliary aids and services in the postsecondary school context

Related services: a term used in the elementary and secondary school context to refer to developmental, corrective, and other supportive services, including psychological, counseling and medical diagnostic services and transportation

Source: <http://www.ed.gov/about/offices/list/ocr/504faq.html>

**VERMONT SCHOOL BOARDS ASSOCIATION
POLICY ON EDUCATIONAL SUPPORT SYSTEMS
(Appendix K)**

This model board policy for the ESS was developed through a collaborative effort of the Vermont Department of Education and the Vermont School Boards Association

CODE G7 (Mandatory): EDUCATIONAL SUPPORT SYSTEM

Policy

It is the policy of the _____ School District to provide a continuum of educational services through a comprehensive Educational Support System to increase the ability of the school to meet the needs of all students in the general education environment.

This policy will comply with the requirements of 16 V.S.A. §§ 2901, 2902 and 2904, and Rules 2194 and 2120.8.1.3.1 of the Vermont State Board of Education.

Definitions

1. *General education environment* means school and non-school environments used for educational purposes by students with and without disabilities such as regular classrooms, school libraries, learning centers and community job sites.
2. *Accommodations* means those evaluation procedures, curricula, materials or programmatic adaptations, behavior management interventions and supplemental aids and services that are necessary for a student to benefit from his or her education or to participate in co-curricular activities.
3. *Supplementary aids and services* means special assistance, materials, equipment and other supports that are provided in regular education classes or other education related settings to enable students to be educated in the general education environment.

Implementation

Each school in the District shall develop a comprehensive system of education services to create an Educational Support System (ESS), designed and implemented in consultation with parents, to assist teachers in accommodating children in the regular classroom. The system shall consist of an Educational Support Team composed of staff from a variety of teaching and support service positions and shall incorporate a range of referral, support and remedial services as well as the means to determine the effectiveness of accommodations or services recommended by the Educational Support Team (EST).

1. The ESS shall:
 - A. Be integrated to the extent appropriate with the general education curriculum;
 - B. Provide a range of support and remedial services, including instructional and behavioral interventions and accommodations;
 - C. Be designed to provide students with needed accommodations and supplementary aids and services regardless of their eligibility for categorical programs;
 - D. Assist all students in working toward attainment of the Vermont Framework or comparable standards;
 - E. Provide clear procedures and methods for handling a student who disrupts a class, including provision of educational options, support services and consultation or training for staff where appropriate;

- F. Ensure collaboration with families, community supports and the system of health and human services;
 - G. Collaborate, to the extent appropriate, with families and community health and human service agencies to assist educators in meeting the academic needs of all students.
2. The EST shall:
- A. Provide a procedure for timely referral for evaluation for special education or other categorical program eligibility when warranted;
 - B. Be composed of staff from a variety of teaching and support services positions;
 - C. Screen referrals of individual students to determine what classroom accommodations and supplementary aids and services have been tried,;
 - D. Determine whether any additional accommodations, supplementary aids and services, or referral to other public or private agencies may appropriately meet a referred student's educational needs;
 - E. Assist teachers in planning and providing supplementary aids and services and other accommodations to students in need of classroom supports or enrichment activities;
 - F. Collaborate, to the extent appropriate, with families and community health and human services agencies to assist educators in meeting the academic needs of all students;
 - G. Develop a means to determine the effectiveness of accommodations and supplementary aids and services provided through the ESS; and
 - H. Maintain a written record of its actions.
3. The Superintendent (Principal) or his or her designee shall:
- A. Appoint the members of each school's Educational Support Team;
 - B. Provide professional development and other resources needed to enable the Educational Support Team and other School District personnel to implement the Educational Support System;
 - C. On an annual basis provide information regarding the existence, purpose and function of the Educational Support System to parents;
 - D. Develop and maintain written administrative procedures in accordance with state Board regulations to implement this policy;
 - E. Complete and submit reports required by the Commissioner of Education to comply with Vermont statutes and regulations;
 - F. Provide to the school board(s) in the District or supervisory union including the SU board (indicate when) an annual report on the status of the ESS including the report to the Commissioner, information on the services and supports provided, the funding sources of the ESS, how the capacity of each ESS to meet its obligations has been addressed in school action plans, and the effectiveness of accommodations, supplementary aids and services provided through the ESS.

Date Warned:

Date Adopted:

Legal Reference(s): Act 230 of the 1990 Vermont Legislature
Act 157 of the 1996 Vermont Legislature
Act 117 of the 2000 Vermont Legislature
16 V.S.A. §§2901, 2902, 2904 (General policy, ESS and EST)
16 V.S.A. §§ 2961 et seq. (Special education funding)
Vt. State Board of Education Manual of Rules & Practices, §§2120.8.1.3.1, 2194

Cross Reference: Local Action Plans (G8)
Professional Development (D2)